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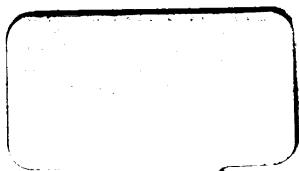
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THE
COMMON LAW
OF
K E N T:

OR, THE
CUSTOMS
OF

Gavelkind.

WITH AN
APPENDIX
CONCERNING

Borough-English.

By THOMAS ROBINSON,
of LINCOLN'S INN, Esq;

SECOND EDITION.

L O N D O N:

Printed by His MAJESTY'S LAW PRINTERS,
For P. URIEL, INNER TEMPLE LANE.

MDCCLXXXVIII.



TO THE
RIGHT HONOURABLE
P H I L I P
Lord *HARDWICKE*,
Baron of *HARDWICKE*,
Lord High Chancellor of
Great Britain.

My LORD,

THE Customs of *Kent* have
a natural Claim to Your
Lordship's Protection, not only as
a Part of that Law over which
You preside, but as they are the
A 2 Usages

The Dedication.

Usages of a County, which, though on many Accounts memorable, glories in nothing so much, as in having sent forth Your Lordship to the common Benefit of the Kingdom.

A Dedication may serve to illustrate the Character of a private Patron, by ascribing to him Excellencies that he has not, or publishing those which he really has; but Your Lordship's eminent Virtues, and high Station have rendered the one impossible, and the other unnecessary. I have therefore no other Part left, but to embrace this Opportunity of publicly testifying my Duty to Your Lordship; and I cannot but flatter myself, that these First Fruits of
my

The Dedication

my Studies may meet with a more favourable Reception, from a Reverence to the Great Name under whose Patronage they now appear.

The Publick, My Lord, has sometimes lamented, that the highest Offices of the Law have been conferred on Persons in the Decline of Life, more out of a Regard to past Services, than the Expectation of future; but the Vigour of Your Lordship's Age and Constitution promises a long Continuance of the Publick Benefits already derived from Your Administration: The Happy Effects of which have rendered it the constant Prayer of all Honest Men, that You may long live in the En-

The Dedication.

joyment of Your present Dignity,
with the same Abilities and Capacity to adorn it. To which General Voice of Your Country I beg Leave to add the particular and sincerest Wishes of,

My LORD,

Your Lordship's

most obedient, and

devoted Servant,

Thomas Robinson

THE
P R E F A C E.

THERE being already extant three *Treatises*, whose Titles bear a Resemblance to the present, the Author thinks it incumbent on him to say something in Justification of his troubling the Publick with one more.

Mr. *Somner's* Inquiry into Gavelkind is limited to the Etymology of the Term, and the Original and Antiquity of the Custom, with a few other speculative Points. Mr. *Taylor* is content with Treating in general of the History and Etymology of *Gavelkind*, without any particular Regard to the *Kentish* Customs, to which he was an entire Stranger. Nor can the Author better shew the main Design of these two Writers to be different from his, than by making Use of their own
Words :

THE PREFACE.

Words: "Many other Things" (says Mr. *Somner* at the End of his Book) "offer themselves to his Discourse, that would treat of *Gavelkind* to the Full; but they are, I take it, mostly Points of Common Law, which because they are not only out of my Profession, but besides my Intention too; which was to handle it chiefly in the Historical Part, and that no further than might conduce to the Discovery of the *Primordia* or Beginnings of it; I shall not wade nor engage any further in the Argument, lest I be justly censured of a Mind to thrust my Sickle into another Man's Harvest." And in like Manner Mr. *Taylor* informs the Reader, in his Preface, That "he presents to his View and Examination, not a Law Case on the Tenure of *Gavelkind* (for that would have proved beyond the Abilities of one that confesses himself no Lawyer, and professes himself ignorant in that Practice and Study) but only the History of it."

To the Account of the *Kentish* Customs at the End of Mr. *Lambard's Perambulation* of that County, the Author owns himself much obliged; and had that judi-

judicious Writer professed to have treated of them as fully, as the Nature of the Subject would have permitted, he would not have attempted it after him: But as Mr. *Lambard* intended his only as a summary Account, so it is, perhaps, too closely confined to the Points in the *Custumal*: And the Author having the Advantage to come after him, has had an Opportunity of clearing up some Matters left doubtful by Mr. *Lambard*, and of rectifying others that have the Appearance of (a) Errors: But to avoid misleading the Reader by any mistaken Conclusion of his own, he has given the Cases distinct where there is any Disagreement; and if he has sometimes ventured to give his own Opinion where the direct Authority of the Books is silent, he thinks he need not caution the Reader to give no further Credit to it, than as it shall appear to him to be reasonable.

He believes he has omitted no Case relating to his Subject to be found in any Book of Authority, either ancient or modern. Nor has he confined himself to the

(a) Vid. infra pag. 45, 66, 169, 171, 177, 183, 217, 254, 264.

Cases already in Print, but traced the Matter higher than the Books, and given the Reader all that occurs, either of Use or Curiosity, concerning these Customs, in the Records of the Proceedings before the *Justices in Eyre for Kent*, in the Reigns of *Hen. 3. Ed. 1. and Ed. 2.* and before the *Justices of Assize* for the same County in the Times of *Hen. 3. Ed. 1. Ed. 2. Ed. 3. and Rich. 2.* In those of the Reigns of *Hen. 4. and 5.* he found nothing worthy Notice. There are likewise most, if not all, the remarkable Records of the same Nature, to be found amongst those of the *King's Bench* in the foregoing Reigns, and a few in the *Common Pleas*; which the Author was directed to by the Indexes and Abstracts of those Records in the Office; to which, as well as the Records themselves, he found easy Access, by the Indulgence of the Gentlemen employed in the Custody of them. These make about a fourth of the Book; and, he believes, will be thought the most valuable Part of it, as they are of an authentick Nature, and a Fund before unknown, and will be found to furnish much uncommon Matter, and to illustrate many Points left doubtful on the printed Books, and the modern Practice

Practice of the Country. He hopes the Reader will not imagine that these Records are inserted as Precedents of Pleading, they being mostly of a Time when the Courts of Law had not arrived at their Present Accuracy in that Particular; and were they more correct, yet as the Necessity of special Pleading in Actions for Lands is, in a great Measure, taken away by the modern Practice of trying Titles on the general Issue in Ejectment, they could, if used for that Purpose, only serve to encrease the Size of the Book, without any View of Benefit to the Reader. But he believes each of these Records will be found to contain some notable Point of the Customs, either confessed by the Parties in the Pleadings, found by the Jury, or adjudged by the Court.

As there is a general Prejudice against all Treatises on Particular Heads of the Law, arising from the usual Publication of them, for the Hopes of a little Gain, in a more imperfect Manner than the same Persons would otherwise have committed them to the World; the Author thinks he ought, in Justice to himself to declare that the Profit, if any, to arise from the Impression, is entirely
to

to the Bookseller ; and if the Book prove of Use or Benefit to his Countrymen, by giving them a more perfect Knowledge of their Customs, the Author has attained his End, in making that publick, which was originally intended for his own private Use in his Practice.

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APPENDIX.

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BOOK

BOOK I.

CHAP. I.

Of the Etymology and several Significations of the Word GAVELKIND.

THE various Opinions of the Antiquaries concerning the Etymology of the Word *Gavelkind*, may be comprehended under these two Heads;

Chap. I.

1. Such as are founded on the Nature of the Lands in Point of Descent;

Or 2dly, On the Nature of the Services yielded by the Land.

The Conjectures of the first Kind are three; whereof the most common and vulgar compounds *Gavelkind* of the Words *Give eal Cyn*, or *Give all Kind*; *Kynd* in * *Dutch* signifying a Male Child. *Lamb. Peramb. iii.* And his Glossary to the *Saxon Laws*, *verbo Terra ex scripto. Co. Litt. 140. Dodderidge's English Lawyer, 73. Cowel in voce. Nat. Bacon, of Government, Quarto Ed. 106. Verstegan's Restitution of decayed Intelligence, 57. Daniel's Hist. of England 38.*

* But Mr. *Sommer* says that *Cynd* in that Language signifies all Children whether Male or Female.

2. Sir

Of the Etymology

Book I.



2. *Sir H. Spelman* in his Glossary under the Word *Gaveletum*, expounds this Term a little differently, as derived from *Gavel* (*tributum vel debitum*) of Right belonging or given to, *Cyn* or *Kynd* (*soboli pueris vel generi*). And in like Manner it is explained in *Minshew's Dictionary* under the Word *Gavelkind*.

Powell's
Welsh Hist.
Edit. 1697.
p. 22.

3. *Mr. Taylor* in his History of *Gavelkind*, deduces the first Part of the Name from the ancient *British* Word *Gafael*, or according to the *English* Pronunciation *Gavel*, which signifies a *Tenure*, p. 26. 96. from the Word *Gafaelu*, to hold, p. 92. But is something at a Loss to account for the Termination, and offers with some Diffidence two Derivations of it, one from the *British* Word *Kennedh Generatio* or *Familia*, and then the Compound will import *the Tenure of the Family*, p. 132. 147. 150. The other from the *Saxon* Word *Gecynde*, Kind or Sort; and he supposes that "the *Saxons* meeting with "the *British* *Gavel*, and understanding it to "be their common Tenure added something "to express it to their own Apprehensions, "which being set together would signify, and "that properly enough, *Genus Tenura*," so called by way of Eminence, "because that "Tenure deserved a Denomination of the "highest Remark, it being, if not the only, "yet the most eminent Tenure among them." p. 134.

But the most natural and easy Account, doing least Violence to the Words, and best supported both by Reason and Authority, is that which is drawn from the Nature of the Services.

Services. According to this Exposition of the Term, it is derived from the *Saxon* Word *Gafol* or, as it is otherwise written, *Gavel*, which signifies *Rent* or a Customary Performance of Husbandry Works; and therefore they called the Land which yields this Kind of Service, *Gavelkind*, that is *Land of the Kind that yields Rent*. This Derivation first attempted by Mr. *Lambard* in his *Perambulation*, § 11. and followed by *Philipot*, in his *Villare Cantianum* p. 2. Mr. *Somner* warmly espouses and maintains with great Learning; proving by a Number of ancient Records that *Gafol* or *Gavel* was a Word of frequent Use among the *Saxons*, and signified not only Tribute Tax or Custom, but also Rent in general; and that under this Term were comprehended all Socage Services whatsoever which lie in *Render* or *Feasance*; the Word being compounded with and applied to the Particulars wherein the Payment, or Performance of the Service consisted; as *Gavel-Corn* signifying Corn-Rent, *Gavel-ertb* Tillage Service, and a Multitude of others: And the Tenant from whom these Services were due was called *Gavelman*. And *Gavelkind* is a Compound of this Word *Gavel* and *Gecynde*, which is Nature, Kind, Quality, or Condition; and therefore the proper Signification of the Term is Land of that kind or Nature that yields Rent, Censual or Rent-Service Land in Contradistinction to Knight-Service Land, which being holden *per liberum servitium armorum* yielded no Cens, Rent, or Service in Money, Provision, or Works. *Somn. c. 1.* So that those Lands are in *Kent* called

Book I.
 Somn. 35. 49.
 called Gavelkind, which in other Countries are distinguished by the Name of Socage. Mr. Somner's Derivation of the Word is further supported by the Opinions of Mr. Just. Fortescue in his Remarks on his Ancestor's *Treatise of Monarchy*, p. 72. and of Mr. Just. Wright in his *Introduction to Tenures*, p. 209.

Gavelkind a
 Tenure.
 V. Somn.
 144. 145.

P. 177, 180.
 182, 183,
 184.

If this be the true Etymology, it is evident that Gavelkind taken in the strictest Sense of the Word denotes the *Tenure* of the Land only (a), and that the Partibility and other Customary Qualities are rather extrinseck and accidental to Gavelkind than necessarily comprehended under that Term. The ancient Charters in Mr. Somner's *Appendix* whereby Lands are granted *Tenendum in Gavelekende*, or *ad Gavelikendam reddendo*, &c. (an Expression frequent before the 18th Ed. i. but not to be met with in any Grant since the Statute *Quia Emptores terrarum*) are strong and unanswerable Instances in Support of this Opinion; the *Tenendum* being the proper and

(a) It occurs in this Sense Litt. sect. 265. Fitz. Barre, 119, Prescription, 52. Rot. Claus. 16 H. 3. m. 14. & 17 H. 3. m. 17. & 37 H. 3. m. 19. in dorso. & 3 Ed. 1. m. 2. 39 H. 3. Itin. Kanc. rot. 1. in dorso. 43 H. 3. Itin. Kanc. rot. 13. 55 H. 3. Itin. Kanc. rot. 20. ibid. rot. 28. ibid. rot. 5. in dorso. rot. 7. rot. 13. rot. 14. rot. 15. in dorso. rot. 38. in dorso. rot. 47. in dorso. rot. 61. in dorso. rot. 62. rot. 76. 7 Ed. 1. Itin. Kanc. rot. 3. in dorso. 21 Ed. 1. Itin. Kanc. rot. 1. in dorso. rot. 23. rot. 70. rot. 53. 6 Ed. 2. Itin. Kanc. rot. 3. rot. 7. in dorso. rot. 17. Mich. 13 Ric. 2. C. B. rot. 645. Mich. 9 Ed. 2. C. B. rot. 240. Trin. 17 Ed. 3. B. R. rot. 32. Trin. 12 Ed. 1. C. B. rot. 68.

usual Place in all Deeds for creating a new Chap.I.
or specifying the old Tenure, and originally ~~~~~
inserted for no other Purpose.

Our Writers of the Law indeed have not Other Signi-
always attended to the strict and original fications of
Sense of the Word, but in the common Lan- the Word.
guage of their Books and Records from the
earliest Times have spoken of Gavelkind as
a Custom; and comprehend under that De-
nomination the several Customs annexed to
Lands of this Tenure in the County of
Kent. (b)

And

(b) Not only the Custom of Partition, of which the
Instances are so numerous that they need not be cited,
but the *special* Customs also are constantly pleaded as
Customs of Gavelkind: As 1. *Tenancy by the Curtesy*
in 55 H. 3. Itin. Kanc. rot. 51. 7 Ed. 1. Itin. Kanc.
rot. 3. in dorso. 21 Ed. 1. Itin. Kanc. rot. 41. 6 Ed.
2. Itin. Kanc. rot. 17. Aff. in Com. Kanc. 16 Ed. 2.
Wm. le Pede's Case. Aff. in Com. Kanc. 17 Ed. 2. &
19 Ed. 2. Robert Pykoc's Case. Aff. in Com. Kanc.
15 Ed. 2. Alex. de Greenhithe's Case. Aff. in Com.
Kanc. 19 Ed. 2. Wm. de Adehullegate's Case. Mich.
13 Ric. 2. C. B. rot. 645. Fitzh. Aid, 129. & 144.
Co. Lit. 30. a. 2dly, *Dower* Pasc. 4 Ed. 1. C. B.
rot. 21. Trin. 5 Ed. 2. B. R. rot. 4. Aff. in Com.
Kanc. 17 Ed. 2. Joan Helles's Case. Mayn. Ed. 2. 284.
Trin. 17 Ed. 3. B. R. rot. 32. 21 Ed. 4. 54. a. Cro.
Eliz. 125. Davies and Selby. Co. Litt. 33. b. 3dly,
Alienation by an Infant of 15, 55 H. 3. Itin. Kanc.
rot. 90. in dorso. Mich. 11 Ed. 3. B. R. rot.
133. Aff. in Com. Kanc. 47 Ed. 3. Simon Parlebiën's
Case. 9 Ed. 3. 38. Aff. in Com. Kanc. 13 Ric. 2.
Peter Hamon's Case. 11 H. 4. 33. and *Wardship of*
Infants. 21 Ed. 1. Itin. Kanc. rot. 35. in dorso.
Mayn. Ed. 2. 610. Aff. in Com. Kanc. 7 Ed. 3. rot.
2. 4thly, *the Father to the Son*, &c. Rot. claus.
8 Ric. 2. m. 2. Firzh. Prescription, 40. Stath. Abr. tit.
Custom



And the Term has by the modern Use acquired still a different Signification, more confined as to the Properties contained under it, but more extensive in Point of Place, being generally at this Day made use of to denote the Partibility of the Land only exclusive of all other Customary Qualities; nor is Gavelkind in ordinary Speech restrained to *Kentish* Lands, but equally and indifferently applied to all partible Lands wheresoever they lie (c).

The

Custom pl. 2. Dyer 310. b. 5^{thly}, *The Trial in a Writ of Right*. 39 H. 3. Itin. Kanc. rot. 3, 4, 18, 25. in dorso. and 55 H. 3. rot. 28, 29, 51, 57. in dorso. and 67. in dorso. 21 Ed. 1. Itin. Kanc. rot. 40. in dorso. 6. *Inclosing of Common*, Mayn. Ed. 2. 508. Whether indeed the Custom of *devising* was ever reputed Part of the Custom of Gavelkind I cannot say, not having been able to trace any Footsteps of such a Custom in ancient Times.

(c) By the Opinion of three Judges against *Wyndham* in the Case of *Wiseman* and *Cotton*, the special Customs of Kent are no Part of the Custom of Gavelkind, for that the Custom of Gavelkind, is in other Countries and Towns, as Ireland, Wales, and many Towns in *Sussex*, scarce two of which Places agree in any other Custom but that of the Descent, 1 Sid. 138. 1 Lev. 80. But the Authorities just above cited sufficiently shew that the special Customs have always been reputed Part of the Custom of Gavelkind. And with regard to the latter Part of this Position that Gavelkind is in other Countries, it is remarkable that although the Name of Gavelkind has been constantly applied to *Kentish* Lands from the Time of King *John* to the present, no Book or Record before the Time of the disgavelling Statute 31 H. 8. (on which the Question in this Case of *Wiseman* and *Cotton* depended) has given that Denomination to partible Lands in any other Country, though many Cases occur

The Word may possibly occur in the following Parts of this Treatise in each of these several

Chap. I.

occur concerning such Lands; but their uniform Language with regard to these is only, *that they are partible and have been parted*. Vide Stat. Wallia 12 Ed. 1. Stat. 27 H. 8. 26. concerning Wales, sect. 35. Stat. 32 H. 8. 29. Itin. Rotel. 14 Ed. 1. rot. 2. in dorso. Rex. Hill. 20 Ed. 3. R. R. rot. 160. Fitz. Prescription, 53. 2 Ed. 3. 12. 3 Ed. 3. 38. 5 Ed. 3. 64. 8 Ed. 3. 42. b. 9 Ed. 3. 14. b. ibid. 27. ibid. 40. b. 23 Aff. pl. 12. 38 Ed. 3. 22. b. Which universal Conformity of the Books and Records in applying the Term to *Kentish Lands*, but never to make use of it as to any others, could hardly have arisen from Chance, were the Name equally proper to both. Some of the Cases go still farther and make a plain Distinction between such partible Lands in other Countries and Gavelkind: As *Bracton*, lib. 3. 374. a. *sicut in Gavelkynde vel alibi ubi terra est partibilis ratione terræ*. And the same Expression in *Fleta*, lib. 6. c. 17. And in *Ralph de Colby's Case*, 2 Ed. 3. 12. concerning Lands of the Fee of the *Marshall* in *Norfolk* alleged to be partible, it is said that in *Gavelkind* it is not necessary to shew an actual Partition of the Lands, because in *Gavelkind* the Tenements are partible by Usage of the Country, but the Fee of the *Marshall* is only in certain Towns, where the greater Part of the Country is at the Common Law, and therefore necessary to shew that the Lands had been actually parted. So in 5 Ed. 3. 64. a. it is said concerning Lands of the Fee of *Gelsy*, pleaded to be partible among the Males, that it is not of these Tenements as of Tenements in *Gavelkind*, for in *Gavelkind* of common Right the Tenements are partible. And in 8 Ed. 3. 42. b. concerning Lands of the like Nature in *Saxham* in *Suffolk*, it is held necessary to shew between whom they had been parted, for that you cannot draw the Tenements out of the common Course of Law, if you cannot shew between whom it was so used, unless you can alledge the Usage of the whole Country as in *Gavelkind*. These observations impeach not the Authority of the Case of *Wiseman* and *Cotton*,

V. Soma. 10.
53.

Of the Various Significations, &c.

Book I.  several Senses, according as the Tenure, the Customs of *Kent*, or the Partibility of Lands in other Countries are the Subject of the Discourse, but still with due Care to avoid all Confusion or Mistakes of the Meaning.

Cotton in the Point adjudged, for the whole Court agreed, V. inf. lib. 1. that if the special Customs of *Kent* are Part of Gavel-kind, yet they are not affected by the disgavelling Statutes. c. 5.

Of the Origin, Antiquity, and Univer-
sality of partible Descents.

MOST of the Customs of this King-
dom variant from the Common Law
are founded on some particular Points of Con-
venience peculiar to the few Places wherein
they obtain; but that which is the Subject
of the present Treatise lays claim to a more
noble Original, being derived from the Uni-
versal Law of the whole World; for anci-
ently all the Children being equally near in
Blood, and entitled to the same Affection and
Support from their Parents, partook alike
of the Possessions descending from them, till
the more refined Policy of later Ages found it
useful, or, as some may think, necessary to
raise Distinctions where Nature made none.

Gavelkind
anciently uni-
versal.
Spelman of
Feuds 43.
V. Seld. Janus
Anglor. c. 7.
Locke against
Filmer, Part
1. Sect. 87,
88, 89.

Before I enter into a particular Considera-
tion of the *Kentish* Custom, it may be proper
for the better ascertaining the Origin of *Ga-
velkind* to take a short View of the partible
Descents in other Nations, and from thence
to deduce the Discourse to our own Country,
and our own Times.

The Descent or Succession among God's
own People the *Jews* was to all the Sons, on-
ly the eldest had in Favour of his Primogeni-
ture, as being the Beginning of his Father's
Strength, (*Deut. xxi. 15.*) a double Portion to
any of the rest. And if such First-born Son
died in his Father's Life-time, this double

Jews.
Hale's Hist.
Com. Law.
208, 209, 210.
Seld. de Suc-
cess. Hæbr. c.
5, 6, 7, 8, 12,
13.
Luke xii. 13,
and xv. 12.

Of the Antiquity and

Book I.

Portion was divided among his Representatives.

But the double Share of the Eldest was confined to the Paternal Possessions; for the Inheritance of the Mother was divided among the Sons, as was the Grandfather's Estate among the Grandsons, in equal Proportions without any such Preference.

The Females did not succeed (except as Representatives of a Male) in the Inheritance of the Father, as long as there were Sons, or any Descendants from Sons in Being: But if the Father left only Daughters, and no Sons, they succeeded equally to their Father, as in Coparcenary, without any Preference of the Eldest to a double Portion. *Numb. c. xxvii.* But they took upon Condition not to marry except to one of their own Tribe. *Numb. c. xxxvi.*

In like Manner among Collaterals the Descent was to all the Brothers without any double Portion to the eldest, for this only took place in that Person who was the First-born of him from whom the Inheritance immediately descended, or his Representatives.

Greeks.

In Greece all the legitimate Sons were equally Heirs to the Father; but if a Man had no Sons, then the Inheritance was to the Husbands of his Daughters; and if he had no Children, then to his Brothers and their Children: And if none of them, then to his next Kindred, the Males being preferred to the Females, and those on the Father's Side down to second Cousins to those on the Part of the Mother. *Petit's Leges Atticæ, c. 1. tit. 6. De Testamentis & Hereditario Jure. Hale's Hist. of the Common Law 211. Potter's Antiq. 1 Vol. 174.*

By

Universality of Partible Descents.

11

By the Law of the Twelve Tables the Descent in the Right Line was without Distinction of Primogeniture to all the Children whether Male or Female, natural or adopted, who remained under the Power of the Father unemancipated at the Time of his Death: And in case a Son was dead or emancipated, his Sons and Daughters came into the Place of their Father by Right of Representation: And all these were termed *sui Heredes*; but the Grandchildren by Daughters succeeded not in the Place of their dead Mothers, till admitted by the more favourable Constitutions of later Emperors.

Chap. II.

Romans.

Just. Inst.

lib. 3. tit. 1.

Just. Nov.

118. c. 1.

Nor were emancipated Children esteemed as Part of the Family with regard to the Inheritance, till in later Times the Equity of the *Prætor* mitigated the Rigour of the Law, by admitting them to the same Share of their Father's Goods, as they would have been entitled to had they remained *sui Heredes*.

Just. Inst. lib.

3. tit. 1. par.

9, & 14.

In the Collateral Line, the Law of the Twelve Tables divided the Inheritance amongst the next of Kin * deriving their Descent through Males, entirely excluding from the Succession † those, who could not make out their Kindred without the Interposition of a Female Parent: But this Hardship on the Descendants of Females was afterwards in some Measure moderated by the *Prætor*, who admitted them to partake of the Inheritance in Default of Descendants by Males; and at last *Justinian* by his 118th Novel Constitution took away all Distinction between the *Agnati* and *Cognati*, admitting

Just. Inst. lib.

3. tit. 2 & 5.

* *Agnati*.

† *Cognati*.

Book I.



both Sexes to take indiscriminately according to Proximity of Blood; but extending the Right of Representation no farther than to Brothers and Sisters Children.

Modern Italy. Inheritances in *Italy* remain partible among the Males to this Day: Nor is this confined to Lands only, but even to the lesser Dignities all the Sons succeed; as if a Count has twenty Sons, every one of them is called Count, and the youngest has an equal Part of his Father's Lands and Goods with the eldest: It is otherwise indeed as to the Estates and Titles of Sovereign Princes.

Germany.

Among the old *Germans* the Children inherited equally, as appears by *Tacitus de Moribus Germani: Hæredes Successoresq; sui cuiq; Liberi, & nullum Testamentum. Si liberi non sunt, proximus Gradus in Possessione Fratres, Patruī, Avunculi.* And this Partible Course of Descent still obtains there by the Name of *Landscheutan*, or, as it is commonly written, *Landskiftan*. Which Word our *Saxon* Ancestors introduced into this Kingdom; and from thence is derived the *Kentish Term* to *shift Land*. *Lamb. Gloss. to the Saxon Laws verbo Terra ex scripto. Lamb. Peramb. 529.*

Feudal Law.

It is to the *Feudal Law* that the Elder Brothers are obliged for the Establishment of their exclusive Right to the Descent, in the Countries where it now prevails; yet originally even by this Law in all Feuds whatsoever, proper or military as well as others, the Course of Succession was to all the Sons, exclusive of the Daughters, and to them equally; until by the Constitution of the Emperor *Frederick* honorary Feuds became indivisible, and

Consuet. Feudorum lib. 1. tit. 1 & 8. lib. 2. tit. 11. Spelm. Gloss. sub verbo Feudum.

and as such, they, and in Imitation of them military Feuds in most Countries began to descend to the eldest Son only." *Wright's Treatise on Tenures*, f. 31. and see the same Book fol. 175. Chap. II.

The Lands in *Normandy* are of two Kinds, *France*. some partible in Point of Descent, and others not partible; the Lands that are partible are *Valvasories*, *Burgages*, and such like, which are much of the Nature of our Socage Lands: These descend to all the Sons, or in their Default to all the Daughters: Lands not partible are *Fiefs de Haubert* and *Dignities*; these descend to the eldest Son, and not to all the Sons; but if there be no Sons, then to all the Daughters and become partible. *Grand Coutumier de Normandy*, c. 26. fol. 41. b. *Hale's Hist. of the Common Law* 215.

And as in *Normandy*, so I believe generally throughout the other Provinces of *France*, tho' their *Fiefs de Haubert*, or Lands holden *per Servitium Lorice* may be descendible to the Eldest, yet their *Fiefs de Roturier*, the Husbandman's or Ploughman's Fees are divisible among all the Sons. And so it is in the very Metropolis of that Kingdom. Vide *Choppin. de Moribus Parisior.* p. 316. *Somn.* 147. Tayl. on Ga- rally throughout the other Provinces of velk. 95.

And now after this short Account of Partible Successions in other Countries, I shall take a Survey of the *British* Dominions, and shew how universally this Manner of Descent formerly obtained in the several Parts thereof, and the Reason of its Discontinuance in most of them.

Of the Antiquity and

Book. I.

I shall first begin with the Countries that have always been Strangers to the Common Law of *England*.

Jersey.

By the Custom of the Island of *Jersey* Estates both real and personal are equally divided among the Sons and Daughters. *Falle's Account of Jersey*, pag. 85.

Scotland.

Whether the Preamble of the Stat. 1 *Jac.* 1. c. 1. reciting that *England* and *Scotland* were antiently but one Kingdom, be true or not; it is certain there was formerly a wonderful Conformity between their Laws, as appears by the old Book called *Regiam Majestatem*, which, as it in Subtance agrees with our *Glanville*, and most commonly Word for Word, so it informs us, that much of the Socage Lands in *Scotland* were partible among the Males; and for that Purpose makes use of the very Words of *Glanville* cited *infra* p. 27. *Si fuerit liber Sockmannus, tunc quidem dividetur Hereditas inter omnes filios, si fuerit Socagium & id antiquitus divisum, &c.*

Ireland.

Though *Ireland* was by the Ordinance of King *John* reduced under the Laws of the conquering Country, yet did they retain many of their antient Customs, and amongst the rest, this of Partition: But the Custom as it was there used being of a very particular Nature, and different in some respects from what we meet with in almost any other Country, I shall here insert the Account given of it by Sir *John Davis* in his Report of this *Irish* Custom, fol. 49.

Vid. Dav.

37. b.

Spelm. Gloss.

Voce Gavel-
tum.

The Lands in that Kingdom possessed by the mere *Irish* were divided into several Territories or Countries, and the Inhabitants of every

every *Irish* Country were divided into several *Septs* or Lineages, in every one of which there was a Chief called *Canfinny*, or *Caput Cognationis* [the Head of the Clan] and all the * inferior Tenancies in these *Irish* Territories were partible among the Males in Gavelkind; but the Estate which these inferior Tenants had in Gavelkind was not an Estate of Inheritance, but a temporary or transitory Possession; for these Lands of the Nature of Gavelkind were not partible among the next Heirs Males of him that died, but among all the Males of this Sept or Clan, in this Manner: The *Canfinny* or Chief of the *Sept* (who was generally the oldest Man in the *Sept*) made all these Partitions according to his Discretion. This *Canfinny* after the Death of every Terre-tenant, who had a competent Portion of Land, assembled all the *Sept* or Clan, and having put all their Possessions in Hotchpot made a new Partition of the Whole; in which Partition he did not assign to the Sons of him, that was dead, the Share that their Father had, but he allotted to every one of the Sept according to his Age a better or larger Purparty.

* But every *Seigniory* or *Chieftry* in these Countries, together with the Portion of Lands which passed with it, were of the Nature and Tenure of *Tanistry*, the Custom of which was that Castles, Manors, Lands, &c. of that Nature used to descend *Seniori & dignissimo viro sanguinis & Cognominis* of the Person dying seised: And that the Daughters of such Person so dying seised were not inheritable. Which Custom was 5 *Jac.* 1. held unreasonable and void. *The Case of the Tanistry, Davis* 29.



These Shares or Purparties being so allotted and assigned, were possessed and enjoyed accordingly till a new Partition was made, which at the Discretion or Will of the *Cannony* might be on the Death of any inferior Tenant. And so by reason of these frequent Partitions, and Translations of the Tenants from one Share to another, all the Possessions were uncertain; and this Uncertainty was the Cause that no Civil Habitations were erected, nor any Inclosure or Improvement made of Lands in the *Irish* Countries where this Custom of Gavelkind was in use.

Nor did this Custom differ from the *Kentish* Gavelkind only in the Manner of Partition, but likewise in three other Points. 1. By this *Irish* Custom of Gavelkind Bastards had their Purparties as well as legitimate Children: 2. * Daughters were not inheritable, tho' their Father died without Is-

* This Exclusion of the Heirs Females was likewise held unreasonable and void in the Custom of the *Tanistry*, as being against the Nature of Fee-simple. *Daw.* 34. But in *England* a Custom of a *Copyhold* Manor, that if a Man should die leaving no Son, and two or more Daughters, the eldest Daughter should have the Copyhold Land for her Life only, and after her Death it should descend to the next Heir Male, who could derive his Descent thro' Males, and in Default of such it should escheat to the Lord, has been held good. *Newton and Shafto*, 1 Lev. 172. 1 Sid. 267. *Simpson and Quinley*, 1 Vent. 88. 1 Lev. 293. 2 Keb. 672. for the Estate being created by the Custom, the Custom may modify it: But it is said, 1 Sid. 267. to have been admitted by all, that this Custom claimed to have been annexed to Lands in Fee at Common Law would have been void and unreasonable, it being against the Nature of the Fee to escheat as long as there are Heirs.

sue Male. 3. Wives were utterly excluded from Dower. Chap. II.

And on Account of all these four Differences all the Judges of *Ireland*, *Hil. 3 Jac. 1.* resolved and declared that this *Irish* Custom of Gavelkind was void in Law; not only for the Inconvenience and Unreasonableness of it, but likewise because it was a mere personal Custom, and could not alter the Descent of the Inheritance: And therefore all the Lands in these *Irish* Territories were adjudged to be descendible according to the Course of the Common Law, and that the Wives should be endowed, and the Daughters become inheritable of these Lands, notwithstanding the *Irish* Usage.

Thus was the *Irish* Custom of *Gavelkind* (as it was improperly called) utterly abolished: But by a late Statute in that Kingdom, in *2 Ann.* order to weaken the Interest of *Papists* there, the Lands of Persons of the *Romish* Persuasion are made descendible in Gavelkind, unless the eldest Son conform to the Protestant Religion, &c. within a particular Time limited by the Act.

It now remains to treat of the Antiquity of the partible Descent within the Realm of *England*, and to shew the several Alterations that in Process of Time it has received.

I shall not depend on the Story of *Brute's* dividing this Island among his three Sons, by allotting *England* to *Lochrine*, *Wales* to *Camber*, and *Scotland* to *Albanact*, as an Evidence *Britons.*
Geoffry of Monmouth.
Enderbie's Cambria Tri-
umphans, f. 10. *Milit. Hist. Eng. Plow. 129. b.* It is said by *Brooke Ch. J.* that the Law of the Britons divided the Inheritance, and Divisions of the Kingdom twice made between Brothers are there mentioned. *V. Seld Janus Anglor. c. 7. Hale's Hist. Com. Law 218.*

dence

Book I.

Welsh.

Powell's
Welsh Hist.
Edit. 1697.
pag. 22.
Enderbie's
Cambria Tri-
umphans, fol.
218.
Powell's
Welsh Hist.
22.

dence of the Custom of Partition among the ancient *Britons*, nor indeed on any other Account of their Laws before their Expulsion into *Wales*, we having little authentick concerning them; but the general Observance of this Manner of Descent among the *Welsh* so religiously tenacious of the Laws and Usages of their Forefathers, will sufficiently prove it to have been the ancient *British* Law; and that not only as to ordinary Inheritances, (which is the Opinion of Sir *Matth. Hale* in his *History of the Common Law* 218.) but as to Titles and Dignities too, and the Jurisdictions annexed to them: for it appears by the Pedigree of *Roderick* the Great, Prince of all *Wales*, set out in *Taylor* on *Gavelkind* fol. 25, and said to have been drawn by an ancient Bard, and by several other Instances in the *Welsh History*, that the Principality of that Country was divided amongst all the Sons of the Prince, and afterwards became subject to other Subdivisions on the Death of a Parcener having more Sons than one.

The *Welsh* Custom of Partition was different from the *Kentish*, and agreeable to the *Irish* in three of the Particulars holden, as is said above, by the Judges of *Ireland* to have been unreasonable. 1. Bastards inherited equally with the Legitimate Sons; and that even in the Principality itself, as appears by an Instance in the abovementioned Pedigree. *Tayl.* 26. 2. Daughters never inherited. 3. Women were not entitled to Dower. And this Correspondence of the two Customs confirms the Opinion of Lord *Coke*,

Coke, 1 Inst. 175. b. That Gavelkind among the *Irisb* was one Mark of the ancient Britons. Chap. II.

However the *Welsh* Custom was not on these Accounts entirely abolished, but only rectified by * *Statutum Walliæ*, in those Points * 12 Ed. 1. which wanted Amendment, and confirmed as to the reasonable Part.

‘ Quia aliter usitatum est in *Walliâ* quam
‘ in *Angliâ* quoad Successionem Hæreditatis,
‘ eò quod Hæreditas partibilis est inter Hæ-
‘ redes masculos, et a tempore cujus non ex-
‘ titerit memoria, partibilis extitit, Dominus
‘ Rex non vult quod Consuetudo illa abro-
‘ getur, sed quod Hæreditates remaneant
‘ partibiles inter consimiles Hæredes, sicut
‘ esse consueverunt, & fiat Partitio illius si-
‘ cut fieri consuevit, Hoc excepto quod
‘ *Bastardi non babeant de cætero Hæreditates,*
‘ *& etiam quod non babeant purpartes cum le-*
‘ *gitimis nec sine legitimis.*

‘ Et si forte Hæreditas aliqua extunc pro
‘ defectu hæredis masculi descendat ad legi-
‘ timas mulieres hæredes ultimi antecessoris
‘ sui inde seifiti, Volumus de gratiâ nostrâ
‘ speciali quod eodem modo mulieres legitimæ
‘ babeant purpartes suas inde sibi in Curiâ
‘ nostrâ assignatas, licet hoc sit contra Consue-
‘ tudinem *Wallensicam* ante usitatam.

* Printed in the old Magna Charta. Rot. Parl. 12 Ed. 1. 2 Inst. 195. Vaugh. 400, 414. Plow. 126. b. Calvin's Case, 7 Rep. 21. b. Hale's Hist. Com. Law 218, All take Notice of this as an Act of Parliament.

And a little higher, Quia mulieres haftenus non extiterant Dotatae, Rex concedit quod dotentur.

Under these Alterations the Custom of Partition still prevailed in the Dominion of *Wales*; and was confirmed, on a further Declaration of the Union of that Principality with the Realm of *England*, by 27 *H. 8.* 26, 35. But was soon after entirely taken away by 34 & 35 *H. 8.* 26, 91, whereby all Mannors, Lands, Tenements, Messuages, and other Hereditaments, and all Rights and Titles to the same in any of the Shires of *Wales* are to be taken, enjoyed, used, and holden as *English* Tenure to all Intents according to the Common Laws of this Realm of *England*, and not to be partible amongst Heirs Male after the Custom of *Gavelkind*, as heretofore in divers Parts of *Wales* was used and accustomed. And the 128th Section of this Act is to the same Purpose.

Saxons.
Hale's Hist.
Com. Law
219.

* The Laws of the *Saxons* and *Danes*, collected by *Brompton* and *Lambard* speak not much concerning the Manner of Descents among them; yet it seems that commonly their ordinary Lands at least descended to all the Children; for amongst

* *Hæreditatem temporibus illis non (quemadmodum apud nos) solus ætate maximus adibat, verum ad filios omnes æqualiter fundus lege veniebat, quod illi Landesciftan dixerunt, & Cantii hæc nostra memoria eodem vocabulo to shift Land, id est herciscere & fundum partiri, appellant. Lamb's Gloss. to the Saxon Laws, verbo, terra ex scripto. Vide Somn. 77. Spelm. of Feuds 12, 40, 43.*

the Laws of *Canute* is this Law, N^o. 68. Chap. II.
Sive quis incuriâ sive morte repentinâ fuerit in-
testatâ mortuus, Dominus tamen nullam * re-
rum suarum partem (præter eam quæ jure debe-
tur Hereoti nomine) sibi assumito: verum eas
judicio sui uxori, Liberis & Cognatione prox-
imis juxte, pro suo cuiq; jure, distribuito.

Parker Ant.
 Eccl. Brit. 108.
 Holt in 6
 Mod. 121.
 1 Peere Wil.
 63. Clement
 & Scudamore.

The same Inference may be made from the
 75th Law of the same King, whereby it
 was enacted, that if a Man died fighting in
 the Army, in the Presence of his Lord, his
 Heriot should be forgiven, and his Heirs
 should succeed in his Goods and his paternal
 Lands, and they should be *shifted* or *divided*
 according to Right.

Tayl. on Ga-
 velk. 143.
 Lamb. Sax.
 Laws 125.
 Seld. Orig. of
 the Eccl. Ju-
 risd. of Testa-
 ments.

And it is the Opinion of Lord *Holt*, in
 the Case of *Blackborough* and *Davis*, that by
 the Common Law both before and at the
 Conquest, all the Children both Male and
 Female inherited as well the real as personal
 Estate of the Ancestor equally and in like
 Proportion.

Salk. 251.
 1 Peere Wil.

* The Saxon Word *Æhte* comprehends both Lands
 and Goods. Somn. 84. For at that Time, as appears
 by the 75th Law of *Canute* here cited, the Heirs
 took both; our present Distinction between the real
 and personal Estate in Point of Descent not being then
 known, nor indeed any where (as it seems) till after
 the Introduction of Feudal Tenures. Mr. *Selden* col-
 lects from the Laws of *Hen. 1.* and the Assise of *Clar-*
endon, that in this Kingdom the Heirs inherited Chat-
 tels as well as Lands, as late as the Times of *Hen. 1.*
 and 2. and that the Law was changed about the Time
 of King *John* by some Act of Parliament, tho' no
 such is now to be found. *Titles of Honour*, 2 Part,
 chap. 5. sect. 21.

Which

Book I.



Which Authorities may be sufficient to guard us against the Mistake of *Brooke Ch. Just. in Plow. 129. b.* that among the *Saxons* the Law was, that the Eldest alone should inherit, and that this Manner of Descent is continued from them to us.

Of the State
of Descents at
the Conquest.

As the Laws of *Normandy* divided Socage Lands among the Sons, the Conquest introduced no considerable Alteration in the general Law of the Land with regard to Inheritances of this Nature; but on the contrary this Course of Descent stands confirmed by a Law of the Conqueror. *Si quis intestatus obierit, Liberi ejus Hereditatem equaliter dividant. Leg. 36. Lamb. Sax. Laws, fol. 167. Seld. in Eadmerum 184. Somn. 83. Hale's Hist. of the Common Law 220.*

Right of Primogeniture
how first introduced into
England.
Hale's Hist.
Com. Law
221, 222, 223
6 Mod. 120.
Clement and
Scudamore.
2 Inst. 595.
Wright's Tenures 175.

The Right of Primogeniture first gained Footing in this Nation by the Introduction of Military Tenures; it being convenient for the Service of the Kingdom to preserve the Fee entire, to the Intent that the Tenant by Knight Service, who by his Tenure was to attend the King in his Wars, might do it with more Dignity and Grandeur; and the Choice fell on the eldest Son, as he was soonest able to perform the Duties of the Fee.

It will be impossible to settle the Period of this Change with Regard to Knight-service Lands, till the Antiquaries are agreed, whether our Military Tenures were in use with the *Saxons*, or were first introduced amongst us by the Conqueror.

But however this be, it ſeems certain that Socage Lands remained partible long after the Conqueſt; tho' indeed we have no exact Account of the precise Time of the general Alteration of Deſcents with Regard to theſe Lands throughout the Kingdom: but from the Silence of Hiſtorians it may be concluded that it was not effected at once, nor by any written Law; but ſeems to have crept in inſenſibly, and by Degrees, in Imitation of the Deſcents of Knight-service Lands; the Owners of Socage Tenements chuſing rather to deprive their younger Sons of their Cuſtomary Share of the Inheritance, than that their elder ſhould not be in a Condition to emulate the State and Grandeur of the military Tenants.

And ſome Inconveniencies ſuggeſted to have ariſen from the equal Division of Inheritances among the Sons are ſuppoſed to have aſſiſted this Change.

“*1^{ſt}*, It weakened the Strength of the Kingdom; for by the frequent parcelling and subdividing of Inheritances, in Proceſs of Time they became ſo divided and crumbled, that there were few Perſons of able Eſtates left to undergo publick Offices and Charges.”

“*2^{dly}*, It did by Degrees bring the Inhabitants to a low Kind of Country-living, and Families were broken; and the younger Sons, who, had they not had theſe little Parcels of Land to apply themſelves to, would have betaken themſelves to Trades or to Civil, Military, or Eccleſiaſtical Employments, neglecting thoſe

“ Op-

V. Charter
Ed. 1. poſt
chap. 5.

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“ Opportunities wholly applied themselves
 “ to those small Divisions of Lands, where-
 “ by they neglected the Opportunity of
 “ greater Advantages of enriching them-
 “ selves and the Kingdom.” *Hale's Hist. of
 the Com. Law* 221.

Hen. 1.
Blackbo-
rough and
Davis, Salk.
251. 1 Peere
Wil. 50.

In the Reign of *Henry I.* according to the Opinion of *Lord Holt*, the Females, in case there were Males, began to be excluded from the real Estate; but the Males still inherited equally the Socage Land. Indeed *Lord Hale* collects from the 70th Law of that King, *Primum Patris Feodum primogenitus Filius habet*, that tho' the whole Land did not descend to the eldest Son, yet it began to look a little that way. *Hist. of Com. Law* 224. But *Mr. Somner* in his Comment on this Law of *Hen. 1.* printed in *Wilkins's Saxon Laws*, pag. 226. interprets the *Primum Feodum* to be only the *Capital Messuage* according to *Glanville, lib. 7. c. 3. (infra)* or what is called in the *Grand Custumier de Normandy, c. 26. Le Chief de Heritage*, for which the younger Sons were to have an equivalent out of the rest of the Inheritance.

Hen. 2.

But the Alteration began to appear more plainly in the Time of *Henry 2.* for according to *Glanville*, who wrote in that Reign, in order to entitle the Sons to take equally, it was necessary not only that the Land should be holden in free Socage, but further *quod sit antiquitus divisum*. The whole Passage is this.

‘ Si plures reliquerit filios, tunc distingui-
 ‘ tur utrum ille fuerit miles seu per Feodum
 ‘ militare tenens, an liber Sockmannus. Quia
 ‘ si

‘ si Miles fuerit vel per Militiam Tenens,
 ‘ tunc secundum Jus Regni Angliæ primo-
 ‘ genitus filius Patri succedit in totum, ita
 ‘ quod nullus frærum suorum partem inde
 ‘ de jure petere potest. Si vero fuerit liber
 ‘ Sokemannus, tunc quidem dividetur Hære-
 ‘ ditas inter omnes filios, quotquot sunt, per
 ‘ partes æquales, si fuerit Socagium & id
 ‘ antiquitus divisum: Salvo tamen capitali
 ‘ Messuagio primogenito filio pro dignitate
 ‘ Æsneziæ suæ, ita tamen quod in aliis re-
 ‘ bus satisfaciatur aliis ad valentiam. Si vero
 ‘ non fuerit antiquitus divisum, tunc primo-
 ‘ genitus secundum quorundam Consuetudi-
 ‘ nem totam Hæreditatem obtinebit: Se-
 ‘ cundum autem quorundam Consuetudinem
 ‘ postnatus filius hæres est. *Glanv. lib. 7. c. 3.*

So that according to this Account it is dif-
 ficult to say, what was then the Common
 Law with regard to Descents of Socage
 Lands, or whether every Person entitling
 himself to them by Inheritance, was not ob-
 liged to set out the special Custom of the
 Place. The same Author indeed, in other
 Parts of his Book, speaks of the Partibi-
 lity of these Lands more generally, and in
 such a Manner as may induce a Belief that it
 remained the Common Law at that Time:

*Plurimum item hæredum Conjunctio, mulierum
 scilicet in feodo militari, vel masculorum vel
 feminarum in libero Socagio. Lib. 13. c. 11.*

And in another very remarkable Passage;
 wherein he shews that the Law so greatly
 respected this equal Division among the Sons,
 as not to permit the Father, even in his Life-
 time, to prefer a favourite Child to any of

D

the

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the rest by advancing him beyond his proportionable Part: 'Sciendum autem, quod
' si quis liberum habens socagium plures reliquerit filios, qui omnes ad hæreditatem
' æqualiter pro æqualibus proportionibus
' sunt admittendi, tunc indistinctè verum est
' quod pater eorum nihil de hæreditate, vel
' de quæstu, si nullam habuerit hæreditatem,
' alicui filiorum, quod excedat rationabilem
' partem suam, quæ ei contingit de totâ
' hæreditate paternâ, donare poterit. Sed
' tantum donare poterit de hæreditate sua
' pater cuilibet filiorum suorum de libero socagio in vitâ suâ, quantum jure successionis
' post mortem patris idem consecutus esset
' de eadem hæreditate. *Lib. 7. c. 1.*

Rich. 1.

Nothing can be affirmed with any tolerable Certainty concerning the Manner of Descents in the Reign of *Richard 1.* there remaining little of the Judicial Records, or other Memorials of the Law in his Time. But it is plain that the Right of Primogeniture made every Day a greater Progress, in so much that in the following Reign of King *John*, it had fairly got the upper Hand of the partible Descent; which, tho' not then so entirely discontinued in most Parts of the Kingdom as at present, yet did not remain the general Law of the Land as it had formerly been; but the Presumption of Law then was, as now, that even Socage Lands, (except in *Kent*) were descendible to the Eldest Son only, unless it were proved that they had always been departible; for in *Mich. 2 John (rot. 7. in dorso)* Gilbert de Beville brought a Writ of Right *de Rationabili Parte*

*Parte** against *William* his Elder Brother for Lands in *Gunthorpe* in *Rutlandshire*, *quæ eum contingunt de Socagio quod fuit Patris eorum in eadem Villâ*, *William* pleaded, *Quod Socagium illud nunquam partitum fuit nec debet partiri, & hoc offert defendere*. And because *Gilbert* the Demandant produced no Proof of the Partibility, *Consideratum est quod Will'us eat sine die, &c.*

And the partible Lands in *Kent* stand distinguished from those at the Common Law by their present Name of *Gavelkind* in *Pas. 9. Job. rot. 7. Kanc.* Where in Assise *William de Valon* the Tenant pleads in Abatement, *quod dimidia illa Carucata terræ est partibilis & Gavelykinde, & unde Johannes* (the Plaintiff) *fratrem habet nomine Thomam qui tale & idem Jus habet, &c.* And the like Pleading occurs in *Pasch. 4. Job. rot. 6. in dorso, Kanc.*

And this Change of the Law is further apparent by *Brañon*, who wrote in the latter End of the Reign of *Hen. 3.* ‘*Si liber Sock-*
‘*mannus moriatur pluribus relictis Hæredi-*
‘*bus & Participibus, si Hæreditas partibi-*
‘*lis sit & ab antiquo divisa, quotquot erunt,*
‘*habeant partes suas æquales; & si unicum*
‘*fuerit Messuagium, illud integre rema-*
‘*neat Primogenito, ita tamen quod alii ha-*
‘*beant ad Valentiam de communi. Si au-*
‘*tem Hæreditas non fuerit divisa ab antiquo,*

* This Case is misprinted in *Hale's Hist. of Com. Law* 153. The Words *Demandant* and *Defendant* being transposed.

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‘ *tunc tota remaneat primogenito.* Si autem
 ‘ Socagium fuerit Villanum, tunc Consue-
 ‘ tudo loci est observanda; est enim Con-
 ‘ suetudo in quibusdam partibus quod postna-
 ‘ tus præferatur primogenito, & e contrario.
Bract. lib. 2. fol. 76. And *Fleta, lib. 5. c. 9.*
fol. 313, copies, as usual, almost the very
 Words of *Bracton*.

And it appears by the Statute of *Wales*
 abovementioned, that the Common Law of
 Descents was in this particular the same in
 12 *Ed. 1.* as it is at present. *Aliiter usitatum*
est in Walliâ quam in Angliâ quoad Successionem
Hæreditatis eo quod hæreditas partibilis est
inter hæredes masculos, &c.

The Reason
 of the Con-
 tinuance of
 Gavelkind in
Kent.

Having thus pursued the Partition of the
 Inheritance from its first Original to the Dis-
 continuance of it in most Parts of the King-
 dom, my next Enquiry shall be, how it came
 to pass, that, notwithstanding this general
 Alteration of the Course of Descents, the
 County of *Kent* disregarding the Example of
 her Neighbours, still adheres to the old Com-
 mon Law, by retaining the partible De-
 scent.

And it is much more easy to lay down
 negatively what was not the Cause of this,
 than affirmatively what is; it being plain,
 that the Continuance of this Custom in *Kent*
 stands not in need of a Confirmation from
 the Conqueror, since it was in his Time the
 Common Law of the Kingdom, as appears
 by his 26th Law abovementioned: But it is
 more difficult to assign the true Cause; Mr.
Sommer finds it easier to refute the fabulous
 Story of the *Kentish* Mens Composition for
 their

their Privileges with the Conqueror, by Means of the Surprize of the Moving Wood of *Swanscombe*, than to give another Account in Lieu of that which he has destroyed; confessing that his Answer must be but conjectural, neither Historians nor Records giving Light into this Matter: But however as his Supposition seems to be the most probable, I shall insert it here.

“ The *Kentish* Men, more careful in those Days to maintain their Issue for the present, than their Houses for the future, were more tenacious, tender, and retentive of the present Custom, and more careful to continue it, than generally those of most other Shires were; not because, Lit. sect. 210. as some give the Reason, the younger be as good Gentlemen as the elder Brethren; (an Argument proper perchance for the partible Land in *Wales*) but because it was Land which by the Nature of it appertained not to the Gentry, but to the Yeomanry, whose Name or House they cared not much to uphold by keeping the Inheritance to the elder Brother.” *Somn.* 89, 90. And this Account agrees well with the Genius and Temper of the People, who, as Mr. *Lambard* observes, “ in this their Estate please themselves, and joy exceedingly; insomuch as a Man may find sundry *Yeomen* (although otherwise for Wealth comparable with many of the Gentle Sort) that will not for all that change their Condition, nor desire to be apparelled with the Titles of Gentry. *Lamb. Peramb.* 9.

Post. lib. 2. c.
5.

Somn. 84.
Post. lib. 2.
c. 5.

p. 81.

The Antiquaries indeed are not unanimous in this Account of the Origin of our Custom, some affirming it to be of foreign Growth, and introduced here by the *Saxons*, and by them derived from the old *Germans*. *Verstegan's Restitution of decayed Intelligence* 57. *Lamb. Gloss. Verbo Terra ex scripto. Lamb. Peramb. 114. Somn. 77, 163. Spelm. Gloss. Verbo Gaveletum. Philipot's Villare Cantianum* 3. But if it is already sufficiently shewn that Lands were generally partible by the Original Law of this, as well as of other Nations, it is plain that the *Saxons* can only claim the Merit of continuing the ancient Course of Descents. And it is much to be doubted whether the Law of Inheritances among the *Saxons* was derived from what *Tacitus* mentions to have been the Usage of the ancient *Germans*; for as the Restriction of *Nullum Testamentum* is no Mark of the Modern Gavelkind, so it is directly contrary to the *Saxon* Law, whose *Alodium* or *Bockland* was beyond all Controversy deviseable by Will, and therefore termed *Terra Testamentalis*.

Mr. *Lambard* in his *Perambulation* 604 raises another Supposition concerning the Introduction of this partible Course of Descent into the County of *Kent* entirely inconsistent with, and, as it seems, built on a slighter Foundation than either of the former, *viz.* That we received it from the Custom of *Normandy*, by the Delivery of *Odo Bishop of Bayeux*, *Earl of Kent*, and Bastard Brother to the Conqueror. Which Opinion Mr. *Somner* refutes by observing, that, had this Custom been transplanted from *Normandy*, it would not

Universality of Partible Descents.

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not have been confined to *Kent*, a Corner only of the Kingdom, but have spread itself over the whole by the Conqueror's Means; whose Inclination and Endeavours to implant the Customs of his own Country are too notorious to be doubted of.

Chap. II.

Mr. *Caltbrop* has given still a different Reason for the Prevalence of the partible Descent in *Kent* and *North Wales*; that these Countries having been more subject to foreign Invasions, the Inheritance for the most part descends in Gavelkind, that every Man there may be of Power for Resistance. But it is a little unfortunate for this Conjecture, that the Lands in *Kent* more peculiarly appropriated to the Defence of the Country by their Subjection to Military Services, are the only Lands in the County originally exempt from the Controul of the Custom.

Reading on Copyhold, p. 18.

This, I think, may suffice concerning the Origin of our Custom with respect to the Quality of Partition: And the Notion that it is the Remains of the old Common Law is further supported by this, that several of the special Customs of *Kent* evidently spring from the same Source; as shall be observed hereafter under their several Heads.

Post. lib. 2. c. 1, 2, 3, 4, 5, 6.

Having dwelt thus long on the Etymology and Antiquity of Gavelkind, it is high Time to pass over to that, which is of more real Use, the Law of the Custom as observed at this Day.

C. H. A. P. III.

In what Places within this Realm the Custom of Gavelkind may be alledged and maintained.

IN discussing of the Matter of this Chapter it will be necessary to use the Word *Gavelkind* in the modern Signification, as a synonymous Term for the *Custom of Partition*: And taking it for granted that Gavelkind may properly exist out of the County of *Kent*, let us see where the Law will suffer it to be set up.

And first, a Personal Prescription to have Lands descend according to the Manner of Gavelkind is not good. *Somn.* 44, 46. For Sons are Parceners in respect of the Custom of the Fee or Inheritance, and not in respect of their Persons. *Co. Litt.* 176. a. And therefore it must be alledged as the Custom of the Place, or it cannot be supported.

Neither can this Custom be laid in every Place; for "in an Upland Town which is
"neither City nor Borough, the Custom of
"Gavelkind or Borough English, cannot be
"alledged," [except in *Kent* where Gavelkind is the Custom of the whole County. *Fitz. Barre* 119.] "But these are Customs
"which may be in Cities or Boroughs; - al-
"so if Lands be within a Manor, Fee, or
"Seignior, the same by the Custom of
"the Manor, Fee, or Seignior, may be
"of the Nature of Gavelkind, or Borough
"English. *Co. Litt.* 110. b. In

Where the Custom may be supported.

Braet. f. 374. a.

In a *Nuper Obijt* brought by a younger Brother against his Elder, for his Share of the Partible Lands of his Father, the Demandant counts, that all the Lands and Tenements in the *Town* of S. are and have been, Time out of Mind, departible among the Males, and that these Tenements are within the Town of S. But the Court inform him that his Demand is insufficient; for that if he will put the Tenements out of the common Course of Law, he ought to do it by reason of the common Custom of the Country, or of some Royalty, as by reason of a Seigniorie or Fee; as to say that the Lands and Tenements within such a Fee are departible, or are of such a Tenure, &c. Whereupon the Demandant counts that all the Lands and Tenements within the *Fee* of S. are and have been Time out of Mind departible, &c. *Hil. 16 Ed. 2. Fitzb. Prescription 53.*

The Custom of Gavelkind may likewise be alledged within a *Soke*. *Gouldsb. 105.* which, according to that Case, is a Precinct to which divers Manors come to do Suit, and (as a great Leet) comprehending divers other Courts. According to *Fleta, lib. 1. c. 47.* *Soke significat Libertatem, Cur' Tenentium:* Or, as Mr. *Somner* more accurately expounds it, The Saxon Word *Soc, Soke, Socne*, signifies a Liberty, Privilege, Franchise, &c. or the Precinct or Territory wherein such Liberty, &c. is exercised, *fol. 133, 137.*

The Reason of putting this Restriction on the Custom in Point of Place, is the Inconvenience and Uncertainty that might arise, if the

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 Post. lib. 2.c.
 3. *ad fin.*

the Usage of every little Village were suffer'd to change the Law. Indeed any Town may alledge a Custom in Furtherance and Advancement of their Right in Law; as to have a Way to Church, or to make By-Laws to regulate their Common, or concerning their Highways. 21 *Ed.* 4. 54. a. 1. *Inst.* 110. b. 5 *Rep.* 63. a. But it is said generally 7 *Ed.* 2. *Mayn.* 212. That tho' the Usage of the Country may defeat the Common Law, the Usage of one or two Towns shall not defeat the Common Law: And in 39 *Ed.* 3. 2. b. That the People of a Town cannot alledge a Usage which is against common Right, if they do not alledge that the Tene-ments are within a certain Fee or Borough.

Several Places
 out of *Kent*
 where the
 Lands are
 partible.

Before I conclude this Chapter, I will take Notice of some among the many Places out of the County of *Kent*, wherein this Manner of Descent yet remains, or at least has been in Force within Time of Memory.

The Lands lying in *Osweldbeck-soke* in the County of *Nottingham* were partible among the Heirs Male, till in 32 *H.* 8. an Act of Parliament was obtained (*cap.* 29.) to make them inheritable according to the Common Law.

It appears by *Hil.* 20 *Ed.* 3. *B. R.* rot. 97. that the Lands within the Fee of *Pickering* in *Norfolk* were then partible among the Males.

And the same is said to be the Custom of the *Soke* of *Rotbelay* in *Leicestershire*. *Goulds.* 105.

Twisden Justice takes Notice in the Case of *Wiseman* and *Cotton* 1 *Sid.* 137. that the Custom

Custom of Gavelkind is in many Towns in *Sussex*; but that scarce any two Places agree in any other of the *Kentish* Customs, but that of the Descent. The Lands lying within the Port of *Rye* in *Sussex* are partible among the Males, and the Wife is endowed of a Moiety, as in Gavelkind. Chap. III.

In *Monmouthshire*, the Lands in the Manors of *Monmouth*, *Usk*, and *Trelleg*, all of large Extent, and in many other Manors in the same County (as I am informed) both Copyhold and Freehold, to this Day descend equally among the Males.

Mr. Taylor, p. 151. affirms of his own Knowledge that there is much Gavelkind Land in *Shropshire*.

In the Territory of *Urchinfield* in *Herefordshire*, which contains two Hundreds, all the Lands are partible among the Males, and in their Default among the Females. *Taylor on Gavelk.* 100, 103, 107.

Philipot in his *Villare Cantianum*, p. 161, says that *Kentish Town* near *Highbgate* partakes of the Customs of Gavelkind. Which may probably be the Reason of its Name.

The Copyholds of the Manors of * *Stepney* and *Hackney* in *Middlesex*, which are of large Extent, descend according to the Nature of Gavelkind, as well in the collateral as the direct Line; as is fully set forth in the Custumal of those Manors (now in Print) agreed upon between the Lord and Te-

* In this Manor are the Lands at *Mile End* mentioned in 2 *Vern.* 163. *Bradley* and *Bradley*, to be descendible after the Manner of Gavelkind.

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nants in the Year 1587, and afterwards confirmed by a private Act of Parliament, in 21 Jac. 1.

And see hereafter Chap. 4 and 5. other Instances of Places subject to the like Custom.

There is in some few Places a Custom of Partition still more extensive than Gavelkind. By a Record *de Itin. Dorset. 16 Ed. 1.* to be found in *Taylor on Gavelkind. 101.* it appears that the Lands within the Borough of *Wareham* in *Dorsetshire* descended by the Custom to both Males and Females by an equal Partition. And I am credibly informed that the Lands in *Taunton Dean* in *Somersetshire* descend in the same Manner.

And the same was formerly the Custom of the City of *Exeter*, as appears by *Pasch. 5. H. 4. coram Rege rot. 29.* In an Assize of Fresh Force brought in the Court of the City of *Exeter* by *John Shepard* and *Joan* his Wife, against *Peter Courtenay* Knight, and afterwards removed into *B. R.* by Writ of Error, the Title of the Plaintiff *Joan* to a Moiety of the Premises in Question is *ut Consanguinea & una haredum, secundum Consuetudinem dictæ Civitatis*, of her Grandfather who died seised (tho' it appears by the Record, that she had a Brother at the Time) *eo quod omnia Tenementa in eadem Civitate sunt departibilia inter masculos & feminas.* And in the Sequel there is Judgment for the Plaintiffs. But by a private Act of Parliament 23 Eliz. c. 12. the Gavelkind Lands (as they are there improperly called) within the City of *Exeter*, are made inheritable as Lands at the Common Law.

In

In *Itin. Rotel.* 14 Ed. 1. rot. 2. in dorso
Rex. In a *Nuper Obiit* brought by Robert,
 Reginald, and John le Chapeleyn against Wil-
 liam their elder Brother, for the partible In-
 heritance of their Father in *Skultborp & Mo-*
reste in that County, there is Mention of a
 customary Partition of a more restrained Na-
 ture than I have met with elsewhere; for the
 Demandants set forth, *quod talis est Consue-*
tudo tenuræ in prædictis villis, quod tenementa,
quæ tenentur in Socagium, tantummodo partibilia
sunt inter fratres de primo Ventre, & non inter
fratres de diverso Ventre.



C H A P. IV.

Of the Manner of pleading the Custom of Gavelkind; and the Difference as to this between Kent and other Counties, and between the General and Special Customs,

AS the Custom of Gavelkind is but local, and not universal, he that would entitle himself by it, must in his Count or Declaration, or if he be a Defendant, in his Plea make Mention of the Custom whereon he founds his Right to the Land; as to say, that the Land is of the Custom of Gavelkind, or, as is the more usual Way of Pleading, that it is *of the Nature and Tenure of Gavelkind*. 5 *Ed.* 4. 8. *b.* *Fitzb. Custom* 4. 21 *Ed.* 4. 57. *b.* 22 *Ed.* 4. 32. *b.* 1 *And.* 192. *Co. Litt.* 175. *b.* And accordingly it was determined in the Case of *Humpbry and Bathurst*, 1 *Lutw.* 754. That the Court could not take Notice that Lands in *Kent* were of the Nature of Gavelkind, without something pleaded, or found in the Record concerning it.

But, if the Lands be in *Kent*, it is not required that this Custom be pleaded in a special and prescriptive Manner; for the Judges of the Common Law pay a particular Respect to the Customs of Gavelkind and *Borough-English*, above all others, by taking Notice of the Nature of them when they are generally alledged, for they are as a general

neral Law. 5 Ed. 4. 8. * *b. Fitzb. Custom* 4. 21 Ed. 4. 56. *b. Co. Litt.* 175. *b. Cro. Car.* 562. 1 *Sid.* 138. 1 *Lutw.* 754. *Salk.* 243. 6 *Mod.* 121, in the Case of *Clement* and *Scudamore*. And therefore, in demanding Gavelkind Land a Man need not prescribe in certain, and shew that the Town, Borough, or City in *Kent*, where the Lands be, is an ancient Town, Borough, or City, and that the Custom has been there Time out of Mind, that Lands within the same Town, Borough, or City, should descend to all the Heirs Males; but it is sufficient to shew the Custom at large, and to say that the Lands lie in *Kent*, and are of the Nature of Gavelkind. *Lamb. Peramb.* 323.

Such therefore is the Diversity between a general Mention of the Custom, and no Mention at all: Nor is there any Book to the contrary of this but *Godb.* 55. where it is said, that in the Prescription of Gavelkind the Party ought to shew that the Land is *partible, and has been parted*.

But this is certainly not Law, unless it be confined merely to such Lands of this Nature, as lie *out* of the County of *Kent*; in which Places indeed the Plea ought to run, that the Land within the Fee, &c. *a toto tempore, &c. partibilia fuerunt & partita*, &c. as being against common Right; and the accustomable and actual Partition is ne-

* Where the Book is misprinted, *nemi* being left out before the Word *prescribe*, as is agreed in 1 *Sid.* 138. *Raym.* 77.

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cessary to be pleaded as well as proved. *Somn.* 48, 53. 3 *Keb.* 216. *Per Hale Ch. J.* And 2 *Ed.* 3. 12. concerning the Lands of the *Fee* of the *Marshal* in *Norfolk*, 5 *Ed.* 3. 64. concerning Lands within the *Fee* of *Gelfy*, 8 *Ed.* 3. 42. *b.* concerning Lands lying in *Saxham* (near *Bury*) in *Suffolk* of the *Fee* of *Pertingfee*, and 9 *Ed.* 3. 40. *b.* of Lands within the *Fee* of *Richmond* are accordingly: In all which Cases the Parties were compelled to shew between whom the Tenements had been parted; for that otherwise they could not draw them out of the Course of the Common Law, *except in Gavelkind*, where it is the Usage of the whole Country, and the Tenements are departible of Common Right. Indeed in 9 *Ed.* 3. 27. it is holden not to be necessary to aver the actual Partition; because having said that the Lands are partible, it is the same Thing, the Partibility being a Consequence of their having been actually parted. And it seems the actual Partition need not be pleaded in the very Lands in Question, tho' out of the County of *Kent*, but it may be sufficient if shewn in other Lands of the same Nature within the *Fee*, &c. *Vide Fitzb. Prescription* 53. *Bro. Custom* 66. *Post. chap.* 5. and 2 *Ed.* 3. 12. 3 *Ed.* 3. 38. 5 *Ed.* 3. 64. and *Robert le Chapeleyn's Case. Itin. Rotel.* 14 *Ed.* 1. *rot.* 2. in *dorso Rex.*

From the judicial Knowledge of our Custom it follows, that if Heirs in *Gavelkind* bring an Action ancestral, and declare on the Custom, it cannot be traversed that there is no such Custom as *Gavelkind*; for it is the
Com-

Common Law where it is used; and it is of Record, and known at the Common Law, and therefore twelve Men shall not make trial of it. So *Borough English* is in divers Towns; and therefore a Man shall not traverse that there is no such Custom as *Borough English*; for it is a Custom by the Common Law. *Long Quinto Ed. 4. 31. a. 22 Ed. 4. 32. b.*

But this general Doctrine that the Courts of Law will take Notice of the Customs of Gavelkind, tho' not specially pleaded, must be taken with a Distinction; for the better understanding of which, as well as for the Order of the following Parts of this Treatise, it will be necessary to divide the Customs incident to *Kentish* Gavelkind Lands into,

1. The *General*,

2. The *Special* Customs of Gavelkind. Customs of Gavelkind, General and Special.
Or according to the more prevailing Notion at this Day, into

1. Such as are *Parcel of* and comprehended under the Name of Gavelkind.

2. Such as are *collateral* to Gavelkind.

The first are such as, according to the Opinion of the Judges in the Case of *Wiseman* and *Cotton*, are absolutely requisite and essential to the Nature of these Lands, as is Partibility among the Males; which of itself, say they, will constitute Gavelkind, and without which it cannot exist. The *Special* or *Collateral*; are such as are not necessary to the Essence of Gavelkind, nor, as they think, properly included under that Term, and

Ante, pag. 6.

E

without



without which it obtains in many Places; but are certain customary Privileges annexed to all Lands of this Nature within the County of *Kent*; and are principally these. 1. That the Husband shall be Tenant by the Curtesy of a Moiety, whether he has Issue or no. 2. That the Wife shall be endowed of a Moiety. 3. The Customary Wardship of the Infant, and that he shall have Power to alien his Lands as soon as he is out of that Custody. 4. The Father to the Bough, and the Son to the Plough. 5. That Gavelkind Lands in that County have been deviseable by Will Time out of Mind. 6. That the Lord may enter for the *Cesser* of his Tenant. 7. A particular Kind of Trial in a Writ of Right, &c.

Courts of Law
take Notice
only of the
General, and
not of the
Special Customs of Gavelkind.
Post. chap. 5.

The Propriety of this Division, and the Use now intended to be made of the Distinction, viz. That the Courts of Law take judicial Notice only of the General, and not of the special Qualities, may be collected from the Case of *Launder* and *Brooks*, Cro. Car. 562. and *Wiseman* and *Cotton* 1 Lev. 79. 1 Sid. 137, 138. Raym. 76.

In both which, as also in the Case of *Browne* and *Brookes*, 2 Sid. 153. It is holden, that tho' it be sufficient for him, that would entitle himself to Lands by Descent according to the Custom of Gavelkind, to say, that the Land is in *Kent*, and of the Nature of Gavelkind, because the Common Law takes Notice what the Custom is; yet the Courts of Law cannot take Consuance of the particular Customs incident to *Kentish* Gavelkind, (as the Custom of devising, to have Dower

Dower of a Moiety, or to be Tenant by the Curtesy without Issue, &c.) unless they are specially pleaded, as from Time whereof, &c.

And *Holt, Ch. 7.* in the Case of *Clement* and *Scudamore, Salk. 243.* says the same of special Customs in *Borough English* Lands; that they must be pleaded by those that would take Advantage of them, and must be taken by the Court to be as they are set forth by the Pleading, and no otherwise.



C H A P. V.

**What Lands and Tenements in Kent
are of the Nature of the Gavelkind:
Of the Effect of the Alteration of
the Tenure, and of the Disgavelling
Statutes.**

All Lands in
Kent presum-
ed to be Ga-
velkind.

AS the special Usages and Laws of particular Places tend in the Instances, wherein they prevail, to defeat the Course of the Common Law, the general Rule is that the Proof of a Custom is turned upon him that would take Advantage of it; but it is a peculiar Favour allowed by the Courts of Law to this Custom, that all Lands whatsoever lying in the County of *Kent* shall be presumed to be of the Nature of Gavelkind till the contrary be made to appear. *Gouge and Woodwin, Mich. 8 Geo. 2. 1734. B. R.* at a Trial at Bar upon an Issue whether Lands Parcel of the Manor of *Dartford* in *Kent* were of the Nature of Gavelkind. *1 Sid. 138. Wiseman and Cotton. 2 Sid. 153. Browne and Brookes. 3 Keb. 216. Randal and Writtle.*

And this is the Reason why the Books call Gavelkind by a higher Appellation than is given to any other Custom, the COMMON LAW OF KENT. *Gouge and Woodwin, Mich. 8 Geo. 2. Lamb. 333. 5 Ed. 4. 8. Somn. 44.*

V. Ante, p.
40.

But the same Favour is not allowed to Gavelkind in any other County, but it lies upon the Party to prove a Customary Partition in
the

the Place. *Somn.* 53. 3 *Keb.* 216. *per Hale*
Ch. 7. For in no County of *England* Lands
at this Day be partible among the Males of
Common Right, saving in *Kent* only. 3 *Ed.*
3. 38. *Co. Litt.* 140. a.

The Presumption therefore being thus, it
is natural to enquire how the contrary may
be proved: And that will appear by shewing
what Lands really are of the Nature of Ga-
velkind, and what not.

As to this, it is certain that all Lands in
the County of *Kent*, which were *anciently* and
originally holden in *Socage* Tenure, are of the
Nature of Gavelkind. *Lamb. Peramb.* $\frac{587}{331}$.
Somn. 50, 90. 9 *H.* 3. *Fitzb. Prescription* 63.
Palm. 163. The Case of *Kirby Lee*.

All ancient
Socage Lands
in *Kent* are
Gavelkind.

And the Custom extends without any Di-
stinction, as well to free *Socage* as base. *Somn.*
49, 55. And tho' there be in *Lambard's*
Peramb. $\frac{528}{28}$. an Inquisition taken after the
Death of *Walter Colepepper* in 1 *Ed.* 3. where-
in the Jury found that the eldest Son was the
Heir to his *Liberum Feodum*, and all his Sons
in common to his Gavelkind Lands; which
might induce a Belief that *anciently* there was
a Distinction as to the Matter of Descent be-
tween free and base *Socage*, yet Mr. *Somner*
maintains, that *Liberum Feodum* never signi-
fied *Free Socage*, but either *Feodum Militare*, V. 55 *H.* 3.
or sometimes Lands granted *absque aliquo ser-* rot. 61.
vitio inde reddendo. f. 56, 57. And as it at
present commonly signifies Lands at Common
Law in Contradistinction to Lands in Ancient
Demefne, (*Co. Litt.* 94. b.) so it was an-
ciently used in the same Sense in Opposi-
tion to Lands of the Custom of Gavelkind,

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as appears by numberless Instances on Record in the *Kentish Iters.* As *Itin. Kanc.* 21 *Ed.* 1. *rot.* 53. *Totus Comitatus quæsitus quibus modis tenementa tenta in Gavelekynde mutari possunt in liberum feodum, &c.* And *Itin. Kanc.* 55 *H.* 3. *rot.* 13, 20, 21, 28. in *dorso.* 47. in *dorso.* 62, 76. 21 *Ed.* 1. *Itin. Kanc. rot.* 40. in *dorso.* *Post. lib.* 2. *c.* 7. And *Mich.* 9 *Ed.* 2. *Rot.* 240. *C. B.* And it is plain by the very Inquisition abovementioned, that the Gavelkind Lands therein contained are free Socage by the Nature of the Services, they being holden not by base and villein Works, but merely by Rents.

Ancient
Knight Ser-
vice Lands in
Kent not Ga-
velkind.

But all Lands, Tenements, and Fees in Kent originally holden by ancient Tenure of Knights Service are descendible to the eldest Son only, according to the ordinary Course of the Common Law, and are not of the Nature of Gavelkind, nor departible by Order of this Custom. *Lamb. Peramb.* $\frac{587}{337}$. $\frac{337}{337}$. *Somn.* 90. *Mich.* 3 *Joh. rot.* 13. in *dorso.* 9 *H.* 3. *Prescription* 63. 55 *H.* 3. *Itin. Kanc. rot.* 20. *Hil.* 10 *Ed.* 1. *C. B. rot.* 27. *De Beggbrok's Case.* 26 *H.* 8. 4. *b.* *Stat.* 31. *H.* 8. *c.* 3. 2 *Inst.* 595. *Palm.* 163. The Case of Kirby Lee. 1 *Sid.* 138. *Hale's Hist. of Com. Law.* 223. *Gouge and Woodwin, Mich.* 8 *Geo.* 2. *B. R.* The Reason whereof was that Lands and Tenements holden by Knights Service, which anciently belonged to the Nobility and Gentry, should not be carried by Descent into many Hands, whereby the Service for Defence of the Realm should be lost or diminished, and the Owners (the Lands being thus divided) become not able

to

to maintain the Countenance of their Order and Degree. 2 *Inst.* 595. Chap. V.

As therefore the right Understanding of what is *Knight Service* cannot but be of Use Of Knight Service. towards discerning what Lands in this County are exempt from the Custom of Gavelkind, it may not be an improper Digression to observe, that a Tenure in Chivalry is created not only by an exprefs Reservation of some Military Service; but also if the King had before 12 *Car.* 2. granted Lands in Fee without reserving any Tenure; or if he had granted the Land by exprefs Words *absque aliquo inde reddendo*, they had in both Cases by Operation of Law been holden by Knight Service * *in Capite*, for that is best for the King. *Wheeler's Case* 6 *Rep.* 6. b. *Lowe's Case* 9 *Rep.* 123. As drawing Wardship and Marriage.

So if before 2 *Ed.* 6. 8. it had been found by Office, or since that Time, and before 12 *Car.* 2. 24. on a *Melius Inquirendum*, that *de quo vel quibus, vel per quæ servitia* the Lands were holden *juratores ignorant*, this shall be taken to be a Tenure [by Knight Service] *in Capite*, for the best shall be taken for the King. 12 *Rep.* 135. 2 *Inst.* 692.

So if upon a *Melius Inquirendum* it were found to be a Tenure of the King, *ut de Manerio, &c. sed per quæ servitia ignorant*, this is a Tenure by Knight Service, as of a Manor. 2 *Inst.* 692.

* A Tenure *in Capite* is a Tenure in. Gross of the Person of the King, and not of any Manor.

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But if the King on his Grant reserve a *Rose pro omnibus servitiis*, this is a Tenure in Socage. *Wheeler's Case* 6 Rep. 6. b.

Actual Partition not necessary.

The Position already laid down, that all Lands in *Kent* of ancient Socage Tenure are Gavelkind, may possibly, by some, be thought too general, and that in order to subject the Lands to this Custom, it may be necessary not only that they have been holden in Socage, but likewise that the Custom of Partition has prevailed in them: But it is to be considered, that the Gavelkind Descent was the old Common Law of the Land, and is yet the Common Law of this County, and therefore not to be prescribed in, nor is it necessary that the younger Sons entitling themselves to these Lands by Descent, should allege that they have ever been actually departed, but they shall be presumed to be of that Nature till the contrary be proved. 2 *Ed.*

Ante, p. 44.

3. 12. 3 *Ed.* 3. 38. 8 *Ed.* 3. 42. 5 *Ed.* 3. 64.

Mr. *Somner* pag. 49. 50. and Mr. *Lambard* in his *Peramb.* p. $\frac{593}{388}$. are both of Opinion, that Gavelkind in this County is to be tried by the Manner of the Socage Services, and not by the Touch of some former Partition; and that tho' the Land has never been parted in Deed, yet if it remains partible in its Nature, it may be parted whenever there shall be Occasion.

Title was made in Affize, that all the Lands in the Fee of *St. Peter of York* were by Custom departible, and had been departed Time out of Mind among the Males. The Tenant pleaded, that the Lands in Demand never were departed; for that none of

Ter-

Terretenants within Time of Memory had ever above one Son. But the Plea was rejected; for if the rest of the Vill is departible, this shall be departible likewise, and shall be of the same Nature: And where it is confessed that the Manor or Vill has such a Custom, it is no Plea to say, that the Land in Question has no such Custom, without shewing some special Matter, as that these Lands are of another Nature than the Gros of the Lands there, for the Custom is general. 23 *Aff. pl.* 12. *Bro. Custom*, 66.

Chap. V.
V. Plac. Aff.
10 Ric. 2.
Post. c. 5.
Steph. ante
Cherche's
Case.

In a *Nuper obiit* for a Moiety of Lands within the Fee of S. within which Fee, as the Demandant alledged, all the Lands were departible, and had been departed Time out of Mind, the Tenant would have pleaded, that the * Lands in Demand were not departible, but the Court refused to receive this Issue, and drove him to plead either that the Lands within the Fee of S. were not departible, or that the Lands in Demand were not within the Fee: Whereupon the Tenant took Issue on the Custom, that the Tenements within the Fee were not departible. *Hil.* 16 *Ed.* 2. *Fitzb. Prescription*, 53.

* Yet in 2 *Ed.* 3. 12. 3 *Ed.* 3. 21. a. 9 *Ed.* 3. 14. b. & 42. b. & M. 10 H. 3. *Prescription*, 64. such Issue was received concerning Lands out of *Kent*; indeed without Debate, except in the first Case. But in 5 *Ed.* 3. 64. concerning Lands out of *Kent*, it was doubted whether the actual Partition of the very Lands in Question was traversable; and so likewise in 3 *Ed.* 3. 38. And it is laid down generally in *Co. Litt.* 78. b. that of common Intendment one Part of a Manor shall not be of another Nature than the rest.

Seeing

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No Prescrip-
tion against
Gavelkind
in Kent.

Seeing therefore that an actual Partition of the Lands is not necessary to be proved, let us consider what will be the Effect of a contrary Usage shewn on the other Side; and first, whether any particular Person can prescribe in a contrary Course of Descent. And I take it, that a personal Prescription, that a Man and his Ancestors, &c. have Time out of Mind, inherited Socage Lands in Kent, by Descent to the eldest Son, can no more prevail against the Common Law of the County, than in other Shires a contrary Prescription by the younger Sons, will make the Lands descendible according to Gavelkind.

V. Ante 32.

If Lands in Gavelkind descend, and the eldest Son has always entered claiming the Whole, so that they never were departed, for that the younger Brothers never put in their Claim, but they now come to claim; it shall be no Plea to say, that the eldest Son has always had the Whole, *absque hoc*, that the younger Brothers ever had any thing, against the Usages which are so general, that Lands of the Nature of Gavelkind are departible. *Mich. 16 Ed. 2. Fitzb. Prescription, 52. Lamb. Peramb. 113.*

V. Robert le
Chapelyn's
Case, Itin.
Rotel. 14 Ed.
1. rot. 2. in
dorso. Rex.

No Usage in
Kent against
the general
Custom of
Gavelkind.

If a personal Prescription cannot overthrow the Custom, what then will be the Force of a contrary Usage in any whole Town or Village within this County (especially if it be not an Upland Town but a Borough) whose Socage Lands may have always been inherited by the eldest Son, and the Descent in Gavelkind never practised there? Mr. *Lambard* 113. holds, that a City, Town, or Borough

rough can no more be exempted for the only Default of putting this Custom in Ure, than the eldest Son in the Case before may prescribe against his younger Brethren: And this, he says, was in his Time the resolute and settled Opinion, not only of the best Professors and Practisers, but of the Justices and Judges of the Law.

I have confined the Description of Gavelkind Lands in this County, to Lands originally of Socage Tenure, for a Tenure of this Kind newly or lately created cannot intitle to the Benefit of the Custom, which in the Nature of it must have continued Time out of Mind: And therefore, if Lands originally holden by Military Services come into the Hands of the Crown, and are afterwards granted out again to be holden in Socage, this will not reduce them to the Nature of Gavelkind, but they will remain as before descendible to the eldest Son only. *Lamb. Peramb. 331. Gouge and Woodwin, Mich. 8 Geo. 2. B. R.*

Of the Effect of the Alteration of the Tenure from Knight-service to Socage.

Fitzh. Prescription, 64.

And for the same Reason the Statute 12 Car. 2. 24. which reduces all Military Tenures to free and common Socage, being made within Time of Memory, cannot be said to make all the Lands in *Kent* holden originally by Knight-Service to be now divisible among the Males generally, if the Custom of Gavelkind never before attached upon them. *Gouge and Woodwin.*

Nor can Gavelkind be created, or Lands made partible at this Day, after the Manner of this Custom in Derogation of the Common Law, even by the King's express Grant for

Book I.  for that Purpose ; and accordingly it is laid down, 37 H. 6. 27. a. and *per Coke 1 Roll's Rep.* 46. that the King cannot by his Letters Patents grant that Lands shall be of the Nature of *Borough-English*, and descendible to the youngest Son. For Customs receiving their Perfection from the Continuance of Time, come not within the Compass of the King's Prerogative. *Coke's Copyholder, Sect.* 31.

Or from Socage to Knight-Service.

Nor, on the other Hand, will every Alteration of the Socage Tenure within Time of Memory, take away or abrogate the Custom ; And therefore it has been adjudged in *B. R.* that if a Man seised of Land of the Nature of Gavelkind makes a Gift in Tail to hold of him by Knight-Service, this Land shall be partible notwithstanding. 26 Hen. 8. 4. b.

And by *Mountague Ch. J.* Where Land in *Kent* was holden in Socage in Gavelkind in the Beginning, and now much of it is holden in Knight-Service, yet the Custom of Gavelkind remains ; for it runs with the Land, and is by Reason of the Land. *Dalif.* 12.

Of the ancient Power of the King and Archbishop of *Canterbury* to change the Descent of Gavelkind Lands.

Anciently indeed our Kings exercised a Prerogative of changing the Customary Descent together with the Tenure ; nor was this a Power inseparably incident to the Crown, but sometimes delegated to others ; for King *John* in the 3d Year of his Reign granted to *Hubert Archbishop of Canterbury*, ' & successoribus suis imperpetuum, quod liceat eis terras, quas homines de feodo Ecclesiæ *Cantuariensis* tenent in Gavelkind, convertere

‘ tere in feodo militum. Et quod idem
 ‘ Episcopus & successores sui eandem in om-
 ‘ nibus potestatem & libertatem habeant in
 ‘ perpetuum in homines illos, qui terras
 ‘ easdem ita in feodo militum conversas
 ‘ tenebunt, & in hæredes eorum, quam
 ‘ ipse Archiepiscopus habet & successores sui
 ‘ post eum habebunt in alios milites de fe-
 ‘ odo Ecclesiæ Cantuar. & in hæredes. Et
 ‘ homines illi & hæredes eorum eandem &
 ‘ omnem libertatem habeant in perpetuum,
 ‘ quam alii milites de feodo Ecclesiæ Can-
 ‘ tuar. & hæredes eorum habent, &c.’ See
the whole Charter in Lamb. Peramb. 588.
and Wilk. Saxon Laws. And such was ac-
 counted the Effect of the Alteration of the
 Tenure under this Licence, that the Gavel-
 kind Lands so converted into Military Fees
 became from thenceforth descendible to the
 eldest Son only; as appears by

55 H. 3. *Itin. Kanc. Rot. 61. in dorso.*

In a *Nuper obiit* brought by *Alan de la Beclaunde* against *Walter de la Beclaunde* his el-
Nuper obiit.
 der Brother, for a Moiety of the Lands of

their Ancestor in *Maydenstan, &c.* The Te-
 nant pleads, that the Demandant ‘ non de-
 ‘ bet inde propartem habere, quia dicit,
 ‘ quòd omnia prædicta tenementa aliquo
 ‘ tempore tenebantur in Gavelykynde, sed
 ‘ dicit quod quidam *Hubertus filius Walteri*
 ‘ quondam *Archiepiscopus Cantuariensis*, de
 ‘ cujus feodo prædicta tenementa fuerunt,
 ‘ & cui *Ʒ. Rex pater Domini R. nunc*,
 ‘ concessit per cartam suam quòd ipse &
 ‘ successores sui possent omnia tenementa de
 ‘ ipsis

Bar, that the
 Lands were
 changed by
 the Arch-
 bishop (of
 whom they
 are holden)
 from Gavel-
 kind into
 Frank-Fee,
 and therefore
 the younger
 Brother not
 intitled.

Book I.



The Deman-
dant replies,
that it could
not be done
without Con-
sent of the
Chapter.

The whole
County find it
might bedone
without Con-
sent of the
Chapter.

• For the
Meaning of
this Expressi-
on, see post.
lib. 2. c. 7.

† But see *Au-
cher's Case*, 3
Ed. 2. infra
lib. 2. c. 8.

Judgment for
the Tenant.

‘ ipfis tenta in Gavelykynde in liberum
‘ feodum convertere, concessit cuidem *Alano*
‘ avo ipsius *Walteri* unum jugum & decem
‘ acras terræ cum pertinentiis in *Maydenstān*,
‘ viz. prædictum Messuagium & terram,
‘ &c. unde prædictus *Alanus* petit pro partem
‘ suam, tenendum sibi & hæredibus suis in
‘ liberum feodum per servitium Militare vi-
‘ cesimæ partis feodo militis, & per viginti,
‘ octo solidos reddendos per annum.’
‘ Et prædictus *Alanus* dicit, quod præ-
‘ dicta Carta, quam prædictus *Archiepis-*
‘ *copus* fecit prædicto *Alano* avo prædicti
‘ *Walteri* sine assensu Capituli sui, non debet
‘ ei obesse, quia dicit quod Consuetudo *Kan-*
‘ *ciæ* talis est quod nullus *Archiepiscopus* po-
‘ test aliquam terram, quæ tenetur in Ga-
‘ velykynde, in liberum feodum convertere
‘ sine assensu prædicti Capituli; & petit ju-
‘ dicialium si prædicta Carta ei debeat obesse,
‘ & quod Consuetudo talis est ponit se super
‘ patriam. Idè fiat inde Jurata. Postea
‘ • *Totus Comitatus recordatur* quod Rex *Jo-*
‘ *hannes* pater Domini *R.* nunc, concessit
‘ *Huberto Waltero* quondam Archiepiscopo
‘ *Cantuariensi* & successoribus suis, quod ipsi
‘ convertere possent terras de eis tentas in Ga-
‘ velykynde in liberum feodum, & quod ipse
‘ *Archiepiscopus* & successores sui semper,
‘ † irrequisito assensu & voluntate Capi-
‘ tuli Ecclesiæ Christi *Cantuariensis*, pro vo-
‘ luntate sua quancuncq; voluerunt, hucusq;
‘ hoc facere consueverunt. Ideo consideratum
‘ est quod prædictus *Walterus* eat inde sine
‘ die quoad prædictam terram, & prædictus
‘ *Alanus*

' *Alanus* nihil capiat, &c. Sed sit in mia,
' &c.'

And this Power of the King and Archb-
shop to change the Descent is farther record-
ed 21 *Ed. 1. Itin. Kanc. Rot. 53.* ' *Totus*
' *Comitatus quæsitus quibus modis tene-*
' *menta tenta in Gavelykynde mutari pos-*
' *sunt in liberum feodum, dicunt quod tan-*
' *tum ex facto & concessione Regum Anglia*
' *& Archiepiscoporum Cantuariensium, &c.*
' *Resid. post. pag. 69.*

But the Charter of King *John* to the
Archbishop seems afterwards to have re-
ceived a contrary Construction; for it is
said by the Court in 26 *H. 8. 4. b.* that there
is certain Land holden of the Archbishop
of *Canterbury* by Knight-Service, which is
Gavelkind departible among the Males.

As to the Power of the Crown in this
Particular, there is a notable Record in
Mich. 9 Ed. 2. C. B. Rot. 240. wherein it
is admitted, that the King may change the
Descent of Gavelkind Lands *immediately*
holden of the Crown, but the Controversy
is, whether this Prerogative extends to such
Lands as are holden of common Persons.
The whole Record is very long, but there
is something curious in it, that may excuse
the inserting *verbatim* all that relates to the
present Purpose.

* *Kanc. Nuper obiit* by *Richard* and *Wil-* *Nuper obiit.*
liam Sons of *Richard de Gatewyk*, for their

* This Suit was commenced in *Itin. Kanc. 6 Ed. 2.*
and is *Rot. 80.* of that *Iter*, and was from thence
adjourned into *C. B.* (as I suppose) *propter difficultatem.*
reasonable

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See this Part
of the Plead-
ings post. lib.
2. c. 3.

reasonable Parts of the Inheritance of their Father in *Effbe* near *Mepeham*, against *Katharine*, *Margaret* and *Elizabeth de Gatewyk* the Daughters of *John* their elder Brother.

As to the Purparty claimed by *Richard*, the Tenants, by their Guardian, plead a Release by him of his Right when of the Age of fifteen, which is by Verdict found to be good by the Custom, and Judgment is accordingly given against him.

‘ Et quoad propartem prædicti *Will'i*, &c.
‘ dicunt quod idem *Will'us* nichil exigere
‘ potest de prædictis tenementis nomine pro-
‘ partis, &c. Dicunt enim quod tres acrae
‘ terrae de prædictis tenementis fuerunt per-
‘ quisitum prædicti *Johannis* patris sui, te-
‘ nendum sibi & hæredibus suis; absq; hoc
‘ quod prædictis *Ricardus* obiisset inde seisi-
‘ tus, &c. Et hoc paratae sunt verificare,
‘ &c.’

Plea that the
Tenure of the
Lands was
changed into
Knight-Ser-
vice by the
Grant of the
Lord con-
firmed by the
King, and
therefore to
descend to
the eldest
Son.

‘ Et quoad residuum omnium aliorum te-
‘ nementorum dicunt quod tenementa illa
‘ sunt *liberum feodum*, & tenentur per servi-
‘ tium militare, & non de tenurâ de *Gavely-*
‘ *kynde*; Dicunt enim quod tenementa illa
‘ dudum fuerunt in seisinâ cujusdam *Will'i*
‘ *de Faukeham*, qui illa tenuit immediatè de
‘ quâdam *Mabilla de Torpel*, quæ quidem
‘ *Mabilla* per cartam suam concessit & con-
‘ firmavit ipsi *Will'o* & hæredibus suis pro ho-
‘ magio & servitio suo omnes terras suas quas
‘ habuit in villâ ipsius *Mabillæ de Effbe*
‘ cum omnibus pertinentiis suis, haben-
‘ dum & tenendum eidem *Will'o* & hære-
‘ dibus suis de ipsâ *Mabillâ* & hæredibus
‘ suis imperpetuum per liberum servitium
‘ quartæ

quartæ partis feodi unius militis, & per
 viginti & septem solidos ipsi *Mabilla* &
 hæredibus suis annuatim reddendos, &c.
 pro omni servitio consuetudine & demanda,
 quæ ad ipsam *Mabillam* vel hæredes suos
 aliquo modo pertinere possent, &c. Di-
 cunt etiam quod Dominus *H. Rex* avus
 Domini *R.* nunc per cartam suam, prædic-
 tam cartam prædictæ *Mabilla* recitans, il-
 lam gratam & ratam habens, ea prædicto
Will'o de Faukebam & hæredibus suis con-
 cessit & pro ipso Rege & hæredibus suis
 sigillo suo confirmavit: Et proferunt hic
 tam prædictam cartam prædictæ *Mabilla*
 quam prædictam cartam Domini *H. R.*
 quæ prædictam concessionem testantur in
 formâ prædicta, &c. Qui quidem *Willus*
de Faukebam tenementa prædicta extunc
 tenuit libere per homagium & servitium
 militare & liberum servitium, sicut præ-
 dictum est, & inde obiit seifitus; cui suc-
 cessit in iisdem quidam *Galfridus* ut filius
 ejus & hæres, qui illa similiter tenuit per
 servitium militare. Qui quidem *Galfri-*
dus de tenementis illis feoffavit prædictum
Richardum de Gatewayk patrem prædicto-
 rum *Richardi* filii *Richardi* & *Will'i*, &
 avum ipsarum *Katharinæ* & aliarum, tenen-
 dum sibi & hæredibus suis imperpetuum
 de capitalibus Dominis feodi, &c. per ser-
 vitia quæ ad illa tenementa pertinent.
 Qui quidem *Richardus* toto tempore suo
 tenementa illa tenuit per servitium mili-
 tare, & inde obiit seifitus ut de libero feo-
 do; cui successit in eisdem prædictus
Johannes de Gatewayk pater ipsarum *Katha-*

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rina & aliarum, qui illa similiter tenuit
per servitium militare, & inde obiit fei-
situs ut de libero feodo, &c. unde petunt
judicium, &c.

Et idem *Will'us*, quoad prædictas tres
acras terræ, quas prædicta *Katharina* & aliæ
asserunt prædictum *Johannem* patrem suum
perquisivisse, dicit quod terra illa non fuit
perquisitum prædicti *Johannis*, immò jus
prædicti *Richardi* patris, &c. & avi, &c.
qui inde obiit seifitus, &c. & hoc peti quod
inquiratur per patriam, & prædicta *Katha-
rina* & aliæ similiter.

Et idem *Will'us*, quoad hoc quod præ-
dicta *Katharina* & aliæ nituntur probare
prædicta tenementa esse liberum feodum
virtute prædictæ cartæ Domini Regis, di-
cit quoad quatuor viginti acras terræ, qua-
tuor acras bosci, & prædictum redditum,
acetiam tertiam partem unius messuagii de
prædictis tenementis, quòd non continen-
tur in eadæ carta, & hoc petit quòd in-
quiratur per patriam, & *Katharina* & aliæ
similiter.

Reply, That
no one can
change Ga-
velkind into
Frank-Fee
but the King
and Archbi-
shop of *Can-
terbury*, and
that only for
such Lands as
are holden
immediately
of them.

Et idem *Will'us*, quoad residuum om-
nium prædictorum tenementorum quæ in
prædicta carta Regis continentur, dicit
quòd carta illa ei obflare non debet, nec
virtute ejusdem cartæ natura prædictorum
tenementorum, quæ ante confectiorem
prædictæ cartæ & tempore confectiõis
ejusdem fuerunt de tenurâ de *Gavelykynde*,
permutari potuit seu debuit; dicit enim
quod *secundum Consuetudinem Comitatus
Kancie nullus potest de tenementis quæ sunt
de tenurâ de Gavelykynde facere liberum
feodum*,

feodum, nisi tantum Dominus Rex & Archiepiscopus Cantuariensis, & hoc solummodo de tenementis quæ de ipsis Rege & Archiepiscopo tenentur in Capite immediatè: Et dicit quòd prædicta Mabilla de Torpel, de quâ prædictus Will'us de Faukeham tenementa illa tenuit, illa tenuit ulterius de quodam Rogero de Monulye, & idem Rogerus illa tenuit de Huberto de Burgh tunc Comite Kancie, & idem Comes illa tenuit de prædicto Henrico Rege, &c. & dicit quod ipse paratus est verificare secundum Consuetudinem prædictam.

*Et Katharina & aliæ dicunt quod Consuetudo non est talis in partibus illis, qualem prædictus Will'us illam esse asserit; dicunt enim quod Dominus Rex per cartam suam potest facere liberum feodum de tenementis quæ sunt de Tenurâ de Gavelykynde tam de illis quæ tenentur de ipso Rege immediatè, * quam de illis quæ tenentur de ipso immediatè: & hoc paratæ sunt verificare, &c. Et super hoc dies datus eis de audiendo iudicio suo hîc, &c. a die Pascæ in xv dies, utrum verificatio illa contra tenorem cartæ prædictæ admittenda sit. Et quoad omnes alios articulos prædictos unde partes prædictæ posuerunt se in Ju-*

Rejoinder,
that the King
may change
Gavelkind
into Frank-
Fee, tho' the
Lands are not
holden im-
mediatly of
him.

Continuance.

* *Henricus Pratt* dat Regi 2 Palfredos pro habenda confirmatione Dom. Regis de 4 Jugatis & 5 Acris terræ in Villa de *Bradborne* in Gavelkynd, ad tenendum de cætero in dimidio feodi militis, sicut Charta *Baldwini de Betun* Comitis *Albemarle* testatur: Fin. Reg. Johannis, Memb. 8. *Lamb. Peramb.* 223.

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Verdict as to
Part.As to the
Lands con-
tained in the
King's Char-
ter, Day given
over.

' ratam patriæ, præceptum est Vicecomiti
 ' quod venire faciat, &c. Postea, &c. Jura-
 ' tores de consensu partium electi venerunt
 ' & dicunt super sacramentum suum, &c.
 ' quod *Richardus* de *Gatewayk* pater prædicti
 ' *Will'i* non obiit seifitus de prædictis tribus
 ' acris terræ propartem ipsius *Will'i* contin-
 ' gentibus. Dicunt etiam quod prædictæ 24
 ' acræ terræ, 4 acræ bosci, 30 solidati red-
 ' ditus, & tertia pars unius messuagii conti-
 ' nentur in prædicta carta Domini Regis, ex-
 ' ceptis xv acris terræ de iisdem quæ non
 ' continentur in eâdem cartâ eò quod post
 ' confectiorem prædictæ cartæ illæ quindecim
 ' acræ terræ perquisitæ fuerunt. Ideo
 ' Consideratum est, &c. quod prædictus
 ' *Will'us*, quoad quinq; acras terræ pro-
 ' partem suam contingentes de prædictis xv
 ' acris terræ quæ non continentur in prædicta
 ' cartâ, recuperet seisinam suam & damna sua,
 ' &c. Et idem *Will'us* quoad residuum, &c.
 ' in mîa, &c.

' Et quoad prædicta Tenementa in præ-
 ' dictâ cartâ Domini Regis contenta, Dies
 ' datus est de audiendo iudicio suo in Octa-
 ' bis Sanctæ Trin. &c. Postea venerunt tam
 ' prædicti *Richardus* & *Will'us* quam præ-
 ' dicta *Katharina* & aliæ, &c.

' Et prædicta *Katharina* & aliæ, ad mayo-
 ' rem & pleniorẽ evidentiam & declara-
 ' tionem rationis suæ præallegatæ, viz. quòd
 ' Dominus Rex potest facere liberum feo-
 ' dum de tenementis, quæ sunt de tenu-
 ' râ de *Gavelykynde*, de aliis quàm de illis
 ' quæ tenentur de ipso Rege immediatè,
 ' pro-

proferunt hic breve Domini Regis in hæc verba. Chap. V.

Edwardus Dei gratiâ, &c. Justiciariis suis de Banco salutem. Cum Richardus de Gatewayk & Will'us de Gatewayk implacitent coram vobis in eodem Banco Katherinam de Gatewayk, Marg. & Eliz. sorores ejusdem Katherinæ, de duabus partibus unius Mes-suagii, &c. (reciting the Premises in Question) in Effbe juxta Mepebam, in quo quidem placito idem Richardus & Will'us placitando clamant prædictas duas partes, &c. esse jus & rationabilem partem suam, quæ eos contingit de Hæreditate, quæ fuit Richardi de Gatewayk patris ipsorum Richardi & Will'i, & avi earundem Kath. Marg. & Eliz. cujus hæredes ipsi sunt, pro eo quod illa tenementa sunt de tenura de Gavely-kynde partibilia inter omnes hæredes & participes hujusmodi hæreditatum in Com. Kanc. ac prædictæ Kath. Margareta & Eliz. in eodem placito coram vobis respondendo allegaverunt quod nos hujusmodi tenementa in feodum militare & serjantiam mutare possimus ex Regia Potestate, & quod antecessores nostri sic fecerunt pro eorum libito voluntatis, & cartam Domini H. quondam Regis Angliæ avi nostri coram vobis exhibuerunt, per quam asserunt dictum avum nostrum tenementa prædicta in feodum militare mutasse & confirmasse; & quia celebris memoriæ Dominus E. quondam Rex Angliæ pater noster, quarto die Maii anno regni sui quarto Johanni de Cobebam omnes terras & tenementa sua, quæ in Gavelikynd tenebantur in Com. Kanc.

The King writes to the Judges to inform them of his Prerogative to change the Tenure and Descent of Gavelkind Lands.

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' in servitium militare mutavit, sicut per in-
 ' spectionem Rotulorum Cancellariæ ipsius
 ' Patris nostri nobis constat, *Nos considerantes*
 ' *quod transmutatio illa ex causis evidentibus &*
 ' *pro commodo regni nostri necessario facta fuit,*
 ' transcriptum cartæ illius juxta inspectio-
 ' nem rotulorum prædictorum vobis mit-
 ' timus præsentibus interclusum, ut illo
 ' inspecto in dicto negotio inter præfatum
 ' *Richardum & Will'm, & Kath. Marg. &*
 ' *Eliz.* pro nostro & regni nostri honore
 ' & commodo, salvâ semper justitiâ in-
 ' offensâ, consultius procedere valeatis. T.
 ' meipso apud *Westm.* xii die Junii anno R.
 ' nostri decimo.

Charter of
 Ed. 1. chang-
 ing the De-
 scent of the
 Gavelkind
 Lands of *John*
de Cobeham.

' Prædictum etiam transcriptum hic missum
 ' inferiùs irrotulatur in hæc verba.
 ' *Edwardus* Dei gratiâ Rex *Angliæ*, Do-
 ' minus *Hiberniæ* & Dux *Acquitaniæ*, Archi-
 ' episcopis, Episcopis, Abbatibus, Priori-
 ' bus, Comitibus, Baronibus, Justiciariis,
 ' Vicecomitibus, Præpositis, Ministris &
 ' omnibus Ballivis & fidelibus suis salutem.
 ' Ad Regiæ Celsitudinis potestatem pertinet
 ' & officium, ut partium suarum leges &
 ' consuetudines, quas justas & utiles censet,
 ' ratas habeat, & observari faciat incon-
 ' cussas; illas autem, quæ regni robur quan-
 ' doque diminuere potius, quam augere
 ' aut conservare videntur, abolere conve-
 ' nit, aut saltem in melius apud fideles
 ' suos & benè meritos de speciali gratiâ
 ' commutare: Cúmque ex diutinâ consuetu-
 ' dine, quæ in Comitatu *Kanciæ* quoad di-
 ' visionem & partitionem terrarum & tene-
 ' mentorum, quæ in Gavelikendam tenere
 ' solent,

solent, frequenter acciderit, ut terræ & te-
 nementa, quæ in quorundam manibus in-
 tegra ad magnum regni subsidium, & ad
 victum multorum decenter sufficere solent,
 in tot partes & particulas inter cohæredes
 postmodum distracta sunt & divisa, ut eo-
 rum nulli pars sua saltem sufficere possit ad
 victum: Nos obsequium laudabile dilecti
 & fidelis nostri *Johannis de Cobeham*, quod
 nobis gratanter exhibuit, gratiâ speciali
 & honore prosequi volentes, concedimus
 eidem & præcipimus pro nobis & hære-
 dibus nostris ut omnes terræ & tenementa
 sua, quæ ad Gavelykendam in feodo tenet
 & habet in Comitatu prædicto, ad primo-
 genitum suum vel alium hæredem suum
 propinquiorem post ipsum, sicut & illa
 quæ per Serjantiam tenet vel per servitium
 militare, integre & absque partitione inter
 alios inde faciendâ descendant, & eidem
 & ejus hæredibus sub eadem lege, salvis
 in omnibus capitalibus Dominis suis ser-
 vitiis & consuetudinibus, aliisque rebus
 omnibus, quæ ad eos de dictis tenemen-
 tis pertinere solent, imperpetuum rema-
 neant; præsertim cum in nullius præ-
 judicium cedere videatur, si circa terras
 & possessiones, quas aliis extraneis licenter
 concedere posset, ad ejus instantiam &
 consensum successionis suæ modum com-
 mutemus. Quare volumus & firmiter præ-
 cipimus pro nobis & hæredibus nostris,
 quod omnes terræ & tenementa, quæ præ-
 dictus *Johannes* in Gavelykendam in feodo
 tenet & habet in Comitatu prædicto, ad
 primogenitum suum vel alium hæredem



‘ suum propinquiorem post ipsum, sicut &
 ‘ illa quæ per Serjantiam tenet vel per ser-
 ‘ vitium militare, integrè absque partitione
 ‘ inter alios inde faciendâ descendant, & ei-
 ‘ dem & ejus hæredibus sub eâdem lege,
 ‘ salvis in omnibus capitalibus Dominis suis
 ‘ servitiis & consuetudinibus, aliisque rebus
 ‘ omnibus, quæ ad eos de dictis tenementis
 ‘ pertinere solent, imperpetuum remaneant,
 ‘ sicut prædictum est. His Testibus, Vene-
 ‘ rabilibus Patribus R. *Cantuariensi* Archie-
 ‘ piscopo totius *Angliæ* Primate, *W. Ros-*
 ‘ *fensi*, & R. *Batton* & *Well.* Episcopis,
 ‘ *Waltero de Valenciâ* avunculo nostro, *Ro-*
 ‘ *gero de mortuo mari*, *Pagano de Cadurtes*,
 ‘ *Rogero de Clifford*, *Roberto de Tybococ*,
 ‘ *Hugone filio Otonis*, *Waltero de Helynn*,
 ‘ *Stephano de Penecester*, *Rogero de Norwode*,
 ‘ & aliis. Datum per manum nostrum apud
 ‘ *Westm.* quarto die Maii anno regni nostri
 ‘ quarto.

‘ Unde eadem *Katharina* & aliæ dicunt
 ‘ quòd ex tenore cartæ prædictæ prædicto
 ‘ *Johanni de Cobeham* factæ satis liquet,
 ‘ quòd Dominus Rex per cartam suam po-
 ‘ test facere liberum feodum de tenementis
 ‘ quæ tenentur in Gavelikendam de aliis,
 ‘ quàm de illis quæ de ipso Rege tenentur
 ‘ immediatè; quæ quidem Carta Regis re-
 ‘ cordum in se gerit, per quod nulla verifi-
 ‘ catio patriæ in contrarium virtutis & ef-
 ‘ fectûs ejusdem est admittenda in hac
 ‘ parte, & petunt Judicium super præmissis
 ‘ &c. Et super hoc dies datus est eis de
 ‘ audiendo iudicio suo hîc, &c.’ Afterwards
 Continuances are entered for two Years more,
 but

but nothing further appears on the Roll. However it is plain by the Time taken to consider of this Matter, that the Information given to the Court by the King's Writ did not satisfy their Doubt.

And the more modern Resolutions do not acknowledge any Prerogative subsisting in the Crown to change the Law and Manner of Gavelkind Descents by altering the Tenure, even as to such Lands as are immediately holden of the King.

Mr. *Lambard* says, that if Lands of ancient Socage-Service come to the Crown, and be delivered out again to be holden either of the Prince *in Capite*, or by Knight-Service of any Manor, they ought to descend according to the Custom, notwithstanding the Tenure be altered. *Peramb.* $\frac{5}{11}\frac{1}{4}$.

And this Position is warranted by the Opinion of the Judges in *Dalif.* 23. Where it "is agreed, by them all, that tho' the Custom of *Burgage* Land is in Socage, yet, if afterwards the Lands come to a Tenure in Chief, or by Knight-Service; this changes not the Custom; which always runs with the Land, and not with the Tenure. As Lands in Gavelkind are of Ante 52. Socage Tenure, yet if they are changed to Knight-Service the Custom is not altered, but all the Heirs shall inherit."

And the same is the Opinion of *Hale* ^{3 Keb. 216.} *Ch. J.* in his *Hist. of the Com. Law*, 223.—^{by the same Judge.} Even in *Kent* if Gavelkind Lands escheat, or come to the Crown by Attainder, or Dissolution of Monasteries, and be granted to be holden by Knight-Service, or *per Baroniam*,
the

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the Customary Descent is not changed, neither can it be but by Act of Parliament, for it is a Custom fixed to the Land.

And accordingly we see, that those, who of late have been inclined to disgavel their Lands, have applied to the Legislature for that Purpose.

Of Gavel-kind Lands in the Hands of the Crown.

But tho' the Change of the Tenure be not a total Extinguishment of the Custom, yet it is still another Question, whether if Lands of this Nature fall into the Hands of the King, who is the Sovereign Lord of all Lands, and who can himself hold by no Tenure, or into the Hands of the Lord who holds over by Knight-Service, this may not cause a temporary Suspension of the Custom during the Continuance of such Unity of Possession.

And first let us see how Gavelkind Lands descend while in the Hands of the Crown.

As to this, Mr. *Lambard* in his *Peramb.* $\frac{2}{3}\frac{3}{8}$ makes a Distinction, " That if Lands of the Nature of Gavelkind come into the King's Hands by Purchase, or by Escheat as holden of the Manor of *A.* which he purchased, after his Death all his Sons shall inherit and divide them. But if they come to him by Forfeiture for Treason, or by Gift in Parliament, so that he is seised of them *in Jure Coronæ*, then his eldest Son only, which shall be King after him, shall enjoy them."

The first Part of this Distinction is denied to be Law by *Judge Twissden*, 1 *Sid.* 138. *Raym.* 77. And is founded merely on what is said by *Serjeant Southcot* in the Case of *Willion*

Willion and *Lord Berkeley*, *Plow.* 234. *b.* That the King's Purchase vests not in his Body Politick, but in his Body Natural; and therefore if Lands in Gavelkind are given to the King and his Heirs, and he dies having two Sons, they shall both inherit together.

But there is no Foundation in Law for this Opinion; for whatever Way the King attain the Possession of Lands, as if he purchase Lands to him and his Heirs, he is seised *in fure Coronæ*, and if he purchase Lands of the Custom of Gavelkind, and dies having divers Sons, the eldest only shall inherit these Lands. *Co. Litt.* 15. *b.*

Nor is it at all strange that the personal Dignity of the King should supersede this Custom, since it will cause the same Change of the Descent in Lands at Common Law; for the eldest Daughter or Sister of a King shall inherit all his Fee-simple Lands; as was the Case of *Queen Mary*. *Co. Litt.* 15. *b.*

And the *dictum* of *Southcot* is in the very Case denied to be Law by *Anthony Browne, Justice*, who holds, that if the King has two Sons and dies, each shall not have a Moiety of his Gavelkind Lands, but the eldest Son shall have the Whole by Prerogative. Indeed the same Judge admits that if Gavelkind Land descends to the King and his Brother [which must be understood of a Descent from a Subject] each of them shall take a Moiety; for if the King should take the whole he should do a Wrong to the other, which his Prerogative will not extend to. *Plow.* 247. *Willion* and *Lord Berkeley*.

Which

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Which agrees with the Opinion of *Moile Just.* 35 *H.* 6. 28. *a.* That if Lands in Gavelkind descend to the King and his Brother, the King shall be in the same Condition as another Person, and he and his Brother shall inherit jointly. Wherein is to be noted the Diversity between a Descent from a Subject to the King, and a Descent together with the Crown.

But the Possession of the Crown of Lands originally Gavelkind, and a contrary Course of Descent by Reason thereof, destroys not but only suspends the Custom, and upon a Separation by Grant of the Lands to a Subject, it immediately revives, and the Lands are again partible among the Males. *Gouge* and *Woodwin*, *Mich.* 8 *Geo.* 2. *B. R.* 2 *Sid.* 83. 1 *Sid.* 138. by *Twisden Just.* in the Case of *Wiseman* and *Coiton*: And by the Opinion of *Sir Anth. Browne Just. Lamb. Peramb.* 333. And the Authorities before, *pag.* 65.

How Gavelkind Lands will descend in the Hands of the Lord.

In the next Place it is to be considered how Gavelkind Lands escheating or granted by the Tenant to the Lord holding over by Knight-Service will descend while in his Hands.

The Customal of *Kent* mentions that if any Tenement by Death or *Cessavit* escheat to the Lord who holds over by Knight-Service, or be by the Tenant granted to him, it shall not be partible among the Heirs Males of the Lord. And this is followed by *Mr. Somner* 144, 149. Indeed *Mr. Lamb. f.* 337. very properly doubts concerning it as not knowing whether it be verified by Experience.

Yet

Yet it seems certain that the Custom was
 anciently thus understood; for in 21 *Ed. 1. Itin.*
Kanc. rot. 53. Berewicke Roll, upon an Issue
 whether Lands were Gavelkind or not, it is
 recorded that * *Totus Comitatus quæsitus* * For the
 ' quibus modis tenementa tenta in Gavele- Meaning of
 ' kynde mutari possunt in liberum feodum, this Expres-
 ' dicunt quod tantum ex facto & concessione sion see post
 ' Regum *Anglia* & Archiepiscoporum *Can-* lib. 2. c. 7.
 ' *tuariensium*, & similiter quando ut escheata
 ' revertuntur ad Dominos feodorum, quorum
 ' tenementa, ad quæ dominia hujusmodi te-
 ' nementorum tentorum in Gavelekynde per-
 ' tinent, sunt *liberum feodum*; & similiter
 ' quando redduntur in manus hujusmodi Do-
 ' minorum præ nimio onere servitiorum sine
 ' spe ipsa rehabendi; sed dicunt quod si forte
 ' prædicti Domini hujusmodi tenementorum
 ' retrodederint eis, qui illa prius reddide-
 ' runt, quoquo modo, tenementa illa re-
 ' vertuntur ad pristinam Consuetudinem, &
 ' fiunt Gavelekynde, prout ante redditio-
 ' nem extiterunt, sed bene licet Dominis
 ' tenentes suos exonerare de servitiis inde
 ' debitis, & nihilominus tenementa præ-
 ' dicta remanent partibilia per Consuetu-
 ' dinem de Gavelekynde.' And Judgment
 was given accordingly. And the same Re-
 cord may be found in *Hil. 26 Ed. 1. Rot. 21.*
B. R. whither it was removed in order to
 Execution.

It is likewise mentioned in *Gouldsb. 106.*
 to be said in an ancient Book of 4 *Ed. 2.*
 In a *Nuper obiit*; that if Lands which have
 been departible and departed come into the
 Lord's Hands by Escheat, they shall not be
 de-



departible in his Hands, *vel in manibus aliqujus alius Perquisitoris non possunt partiri*; and it is there said that such likewise was the Opinion of *Bromley, Lord Chancellor*.

But the Strength of the later Authorities is to the contrary.

It is said by the Court 14 *H. 4. 9. b.* That if Gavelkind Lands come into the Hands of the Lord the Custom is not extinct, as if the Lord of the Lands in Gavelkind purchase, &c. his Heirs Males shall inherit by the Custom. And *Brooke* in his Abridgment of this Case, Title *Custom 19.* and *Extinguishment 14.* says, that Unity of Possession is not an Extinguishment of the Custom of Gavelkind, *Borough-English*, or to be endowed of the whole, & *buju/modi* which run with the Land.

11 *H. 7. 25. b.* It is said by *Wood*, that if the Lord purchases Land holden in Gavelkind, both Sons of the Lord shall inherit, as well as if it had remained in Possession of the Tenant; for that Gavelkind arises (*est surdant*) on the Land only.

Unity of Possession in the Lord will not hurt the Customs of *Gavelkind* or *Borough-English*, because of the Generality of them, they extending themselves throughout the whole Country. *Keilw. 80.*

It is holden by *Brown* and *Hale* Justices, *Dalif. 12.* That if Lands in Ancient Demesne are partible among the Heirs Males, and the Lord purchases these Lands, his Heirs Males shall inherit together, and yet in his Hands the Land is Frank-Fee.



In the Case of *Wiseman* and *Cotton*, 1 *Sid.* 138. One of the Counsel asserts that if Gavelkind Lands are holden of a Seigniorship which holds in Knight-Service, and afterwards they escheat, the Gavelkind Custom is destroyed; and of this Opinion is *Windham*, *Just.* in the same Case, 1 *Keb.* 505. which is denied by *Twisden*, *Just.* 1 *Sid.* 138. who, as is there said, was well versed in the Laws of his own Country.

In this last Case it is not expressly denied by *Twisden* that the Custom is suspended, but only that it is destroyed: Indeed the rest of the later Authorities are very strong; otherwise there might be some Colour to say that these Lands, being become by the Unity of Possession Parcel of the Manor so holden by Knight-Service, should partake of the general Nature of the Whole, and pass with the rest to the eldest Son, rather than that the Manor should be dismembered by a different Descent of the Demesnes; according to the Rule, *transeunt cum universitate, quæ per se non transeunt.*

It may not be improper to consider in the next Place by what other Means the Custom of Gavelkind may be altered, and the Lands made of the Nature of those descendible according to the Course of the Common Law.

1. The Custom of Gavelkind is not *Dav.* 36. changed though a Fine or Recovery be had of the same at Common Law; for it is a Custom by Reason of the Land, and therefore runs always with the Land. *Finch's* kind Lands. *Law* 15.

But

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Whether Ancient Demeſne Lands partible remain ſo, when Frank-Fee.

But otherwiſe, ſays the ſame Book, it is of Lands in *Ancient Demeſne* partible among the Males, for there the Cuſtom runs not with the Lands ſimply, but by Reaſon of the Ancient Demeſne; and therefore, becauſe the Nature of the Land is changed by Fine or Recovery from Ancient Demeſne to * Land at Common Law, the Cuſtom of parting it among the Males is gone.

But it ſeems this Author is miſtaken in the latter Part: For in *Dyer p. 72.* cited in the Margin of that Book, it is ſaid to be the better Opinion, That if the Lands in Ancient Demeſne, which are departible among the Heirs Males, are aliened by a Fine at Common Law, the Courſe of the Inheritance ſhall not be changed, nor the Lands made deſcendible to the Heir at Common Law.

And the Caſe is more fully reported in *Daliſ. 12.* Where *Hale* and *Brown* Juſtices, hold, that if there be a Cuſtom within Ancient Demeſne that the Lands there ſhall be parted among the Heirs Males, tho' the Tenant levies a Fine of his Land, or ſuffers a Recovery at Common Law, yet the Lands are departible as before; for this Cuſtom runs with the Land, and is not in reſpect of the Seigniorſhip which is Ancient Demeſne; for if the Lord purchaſes theſe Lands, his Heirs Males ſhall in-

* It is rendered Frank-Fee till the Fine or Recovery is reverſed by the Lord in a Writ of Diſceit. 8 *Ed. 4.* 6. *Bro. Fine*, 36, 47, 101.

herit together, and yet the Land in his Hands is Frank-Fee. But *Mountague, Ch. 7. è contra*; for this is not like the Custom of Gavelkind, which is annexed to the Land, and is by reason of the Land; but in Ancient Demesne the Custom is annexed to (*trenche ove*) the Land by Reason of Ancient Demesne, and therefore when the Lands become Frank-Fee they shall not be departible, for the Nature of Ancient Demesne being changed, the Custom is also changed.

The Opinion of *Hale* and *Brown* in the foregoing Case is agreeable to what is laid down 49 *Ed. 3. 8. a.* by *Kirton* (a Name abridged, as I take it, for *Kyrketon* a Judge of C. B. at that Time) concerning Lands in Ancient Demesne descendible by the Custom of the Manor to the youngest Son; in which Case, says he, if the Lord of the Manor releases to the Tenant all his Right, so that he has lost his Seignior, or if he confirms to hold of him by lesser Services, the Nature of the Tenancy is not changed having Regard to the Inheritance of the Tenancy against the Heir, for the youngest Son shall have the Land as he would have had before, and not the Elder; nevertheless as against the Lord who released, having regard to his Seignior, the Tenancy is changed.

But in Questions of this Kind the Custom of the Place is greatly to be regarded, for the general Intendment of Law may be controuled by a Usage to the contrary.

G

2. If

Book I.

Custom of
Gavelkind in
Copyhold not
destroyed by
Severance
from the
Manor.

2. If Copyhold Lands by the Custom of the Manor be of the Nature of *Borough-English* or *Gavelkind*, and the Lord severs a Copyhold from the Manor by granting the Inheritance thereof to a Stranger in Fee, or by making a Lease for Years of such Copyhold by Indenture, yet the Customs of *Gavelkind* or *Borough-English* and all other Customs which run with the Land remain notwithstanding the Severance. 4 *Rep.* 25. a. in *Murrel and Smith's Case.* 2 *Leon.* 208. *Beale and Langley.*

No Act of the
Tenant can
alter the Man-
ner of Descent
of Gavelkind
Lands.

3. Lastly the Owner of Lands cannot by his Grant change the Course of the Descent: For if a Man seised of Lands in *Gavelkind* give or devise them to his *eldest* Heirs, he cannot thereby alter the customary Inheritance but the Law, *us res magis valeat* rejects the Adjective *Eldest.* *Co. Litt.* 27.

Nor of Bo-
rough Eng-
lish.

And the same Law is of *Borough-English*: For a Person after 27 *H.* 8. made a Feoffment of *Borough-English* Lands to the Use of himself and the Heirs Males of his Body *secundum Cursum Communis Legis*, and afterwards died seised; and it was the Opinion of the whole Board at *Serjeants-Inn*, that the youngest Son should have them by Descent notwithstanding the Words beforementioned. *Dyer* 179. b.

Nothing can
extinguish the
Custom of
Gavelkind
but an Act of
Parliament.

Upon the whole it may be concluded that the Nature of *Gavelkind* Land cannot be entirely changed, nor the Custom extinguished beyond a Possibility of Revivor, neither by Alteration of the Tenure, nor by Unity of Possession of the Lord, or of the King, nor by Fine or Recovery, or other Act

Act of the Party, nor indeed by any ordinary Means, but by Act of Parliament only. Chap. V.

Which naturally leads me to consider the Statutes made for Disgavelling Lands in Kent, and the Effects of them.

The several Statutes made for this Purpose are 31 H. 8. 3. and six private Acts not printed in the Statute Books, one in 11 H. 7. for disgavelling the Lands of Sir Richard Guldeford; another 15 H. 8. for the Lands of Sir Hen. Wyatt only; another 2 & 3 Ed. 6. another 1 Eliz. and another in the 8th Year of the same Reign, and the last in 21 Jac. 1. The disgavelling Statutes and Effects of them.

The Words made Use of by the Statute 31 H. 8. 3. are, That all Manors, Lands, Tenements, Woods, Pastures, Rents, Services, Reversions and Remainders, Advowsons, and all other Hereditaments whatsoever, lying and being within the County of Kent, of which the Persons mentioned in the Act were at that Time seised, which then were of the Tenure and Nature of Gavelkind, and before that Time had been departed or departible between the Heirs Males by the Custom of Gavelkind, should from thenceforth be clearly changed from the said Custom, Tenure, and Nature of Gavelkind, and should from that Time in no wise be departed or departible by the said Custom of Gavelkind between the Heirs Males, but should remain, revert, abide, descend, come or be after and according as Lands, Tenements, &c. do or may descend, remain, &c. according to the Common Law of this Realm, and as other Manors, Lands

Book I.



and Tenements being in the said County of *Kent* which never were held by Service of Socage, but then were and always had been holden by Knight-Service, do descend, &c. and in like Manner to descend and be descendible, remain, revert, come and be inheritable to the Heir or Heirs after and according to the said Common Laws, &c. And that all and singular the said Lands, Tenements, Hereditaments, &c. should from thenceforth be accepted, taken, inherited, deemed and judged to be like as Lands, Tenements, &c. at the Common Law, &c. and in such Manner and Form as if the same Lands, Tenements, &c. had never been of the said Nature of Gavelkind; any Usage or Custom in the said County to the contrary notwithstanding.

1 Stat. 135.

And in the Statute of *Ed. 6.* There is a Clause, That the Lands should be disgavelled, and should from thenceforth be to all Intents, Constructions and Purposes whatsoever as Lands at Common Law, as if they had never been of the Nature of Gavelkind, and that they should descend as Lands at Common Law, any Custom to the contrary notwithstanding.

The Words of these Statutes are very general to make the Lands as if they had never been of the Nature of Gavelkind, but the Construction is more restrained :

In an Ejectment for Lands in *Kent* a Question arose, whether Lands which had been Gavelkind, but were by 2 & 3 *Ed. 6.* disgavelled and made descendible according to the Course of the Common Law, did not-



notwithstanding remain deviseable by Will according to the Custom of *Kent* as to Gavelkind: And the Court after two Arguments adjudged that the Statutes of disgaveling only took away the Partibility, and not the other Qualities or Customs appertaining to Lands in *Kent* of the Nature of Gavelkind; for that they are merely collateral to the Nature of Gavelkind (though *Wyndham* Just. thought them Parts of the Custom of Gavelkind): And the last Clause, that the Lands shall descend according to the Common Law, shall qualify the Generality of the precedent Words; And tho' such Custom were to be taken to be Parcel of and comprehended under Gavelkind, yet it was not the Design of either of these Acts to divest these Lands of any of their former Privileges not expressly altered by the Letter of these Laws; for else instead of a Benefit which the Acts intended (they being made on the Petition of the Persons therein-mentioned) the Owners of Gavelkind Lands would suffer a great Prejudice by the Loss of their former Privileges, as in the Case of Forfeiture for Felony and the like. *Hil. 13 Car. 2. B. R. Rot. 476. Wiseman and Cotton. Hard. 325. 1 Sid. 135. Raym. 59, 76. 1 Lev. 79.* And the same Opinion had been before declared *obiter* by *Glynne Ch. J.* concerning the Statute 31 *H. 8. 3.* that it extends to no other Custom of the Land, save that of the Descent. In the Case of *Brown and Brookes 1659*, according to a MS. Note which I have seen of that Case written in the Hand of *Pemberton*, afterwards *Ch. J.*

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It may be a proper Caution to the Reader, that all these disgavelling Statutes being *particular* Acts, the Courts of Law cannot take judicial Notice of them; but if any Use is proposed to be made of them, an attested Copy examined with the Record ought to be given in Evidence. Indeed the Statute 31 H. 8. c. 3. being printed in the Statute Book by the King's Printer, according to the modern Practice, Credit will be given to it, and it may be read in Evidence to a Jury as a true Copy.

V. Salk. 566.

This may suffice to shew what Lands in general are of the Nature of Gavelkind.

Remainder of
Gavelkind
Land.

It is further to be observed, that a Remainder, being but the Residue of the Estate in the Land, shall descend in the same Manner as the Lands in Possession. As if the Ancestor die seised of the Reversion or Remainder in Fee or Fee-Tail expectant on an Estate for Life or in Tail, this shall be divided among all the Heirs Males; and such Remainder of *Borough-English* Lands shall descend to the youngest Son. 26 H. 8. 4. b. Bro. Custom 1. Lamb. Peramb. 548. Dyer 128. Style 410.

Use.

The Use also of Gavelkind Land shall follow the Nature of the Land out of which it issues, and be partible among all the Males, it not being a Thing newly created but the ancient Use. And in *Borough English* the Use shall descend to the youngest Son; for even before the Statute 27 H. 8. the Chancellor in Case of a Use of Gavelkind or *Borough-English* judged by Imitation of the Rules of the Common Law, and the Nature
and

and Quality of the Land. 14 H. 8. 6. a Chap. V.
 26 H. 8. 4. b. 2 Roll's Abr. 780. 27 H. 
 8. 9. 21 Ed. 4. 24. b. 5. Ed. 4. 7. b. Bro.
 Feoffment al' Uses, 32. 1 Rep. 88. 101. a. Co.
 Litt. 23. a. And the same it is at present of
 a Trust.

If a Fair or Market be holden on Gavel- Profits of
 kind Land, such Profits thereof as arise a Fair or
 from or by reason of the Soil shall descend in Market.
 the same Manner as the Land would descend
 by the Custom; but such as are independent
 of the Soil shall go to the eldest Son only;
 as may be inferred from what is laid down
 by the Court, *Moor* 474. in the Case of
Heddey and *Wellbouse*, That if the King grants
 a Fair or Market with Toll certain to a
 Man and his Heirs, to be holden within
 Land which is *Borough English*, and the
 Grantee dies, the Heir at Common Law
 shall have the Fair or Market with the Toll,
 but the younger Son shall have the Pickage
 and Stallage as incident to the Soil. And
 the same Thing was affirmed *obiter* by *Bury*
Cb. Baron, in the Case of *Rebow* and *Bickerton*,
Trin. 7 Geo. 1. in Scacc. because the former
 is not annexed to the Land, but the latter are
 incident to the Soil.

There is no Point concerning the Law of What Rents
 Gavelkind that has given Occasion to a greater out of Gavel-
 Variety of Opinions than this, Whether a Rent kind follow
 issuing out of Gavelkind Land shall follow the Nature of
 the Nature of the Land or no. the Land.

Indeed the Books generally agree, that a
 Rent which has continued Time out of
 Mind is of the Nature of the Land, and as



such shall be departible among the Heirs Males, and the Wife shall be endowed of a Moiety, &c. 4 *Ed.* 3. 32. *Bro. Custom*, 58. *Fitzb. Dower*, 113.

But this must be taken with a Distinction, that it be not Rent-Service Parcel of a Manor originally holden by Knight-Service, which will descend with the Manor :

For though the Tenancy be of Gavelkind Nature, yet the Rent-Service by which such Tenancy is holden may well be descendible at the Common Law. 7 *Ed.* 3. 38. *Fitzb. Avowry*, 150. *Lamb. Peramb.* 548.

Lord, Mesne and Tenant, and the Land is holden in Gavelkind, yet the Rent and Service of the Mesne may be holden at Common Law, unless it is especially shewn that the Rent is of the same Nature as the Land is. 21 *H.* 6. 11. *b.*

Nor does there ever seem to have been any Doubt concerning a Rent reserved on a Gift in Tail, or Lease for Life or Years of Gavelkind Lands, but as incident to the Reversion it shall follow the Nature of the Lands. 22 *Ed.* 4. 10. *b.* *Dyer* 5. *b.*

But the great Question has been concerning a Rent-Charge out of these Lands commencing by Grant within Time of Memory.

The Authorities which make for the Heir at Common Law are these.

Rent or Common out of Land in Gavelkind, *Borough English*, & *buju/modi*, if of ancient Time, shall be of the Nature of the Land, as that a Wife shall be endowed of a Moiety ; but otherwise it is of a Rent newly granted.

granted. 4 *Ed.* 3. 32. *Bro. Custom*, 58. *Chap. V.*
Fitz. Dower, 113.

Trin. 26 *H.* 8. 4. *b. Shelley Just.* holds, that a Rent granted out of Gavelkind Land shall not be partible among the Males, because the Prescription is the Thing which makes the Land of such Tenure, and this ought to be for Time out of Mind, and therefore cannot take Place in this Rent newly commenced; and the Prescription of Gavelkind also is that the Land is holden in Socage, and this Rent does not lie in Tenure, and therefore the Prescription cannot serve for it. But *Norwich* and *Fitzberbert, Justices*, held the contrary; and *Fitzberbert* said, that he had known four Judgments in Point that the Rent shall follow the Nature of the Land.

And the very Term after *Shelley* maintains his former Sentiments, and says, that he had always been of Opinion, tho' *Fitzberbert* thought the contrary, that a Rent-charge out of Gavelkind Land is not departible; but that if the Rent is reserved on a Lease, so that it is incident to the Reversion, peradventure it is departible. *Dyer* 5 *b.*

A Custom never extends to a Thing newly created, and therefore if a Rent be granted out of Gavelkind Lands, or *Borough English*, the Rent shall descend according to the Course of the Common Law. *Co. Copyh. Sect.* 33.

The Authorities to the contrary are these.

Inter Plac. Assisarum in Com. Kanc. 10 *Ric.*

2. An Assise of *Mortdancestor* brought by *Stephen atte Cherebe, Clerk*, and *Nicholas* his Brother,

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Brother, as Heirs to their Father *Stephen atte Cherche*, against *Tho. Northbryn* and others, for a Rent-charge of a third Part of three Bushels of Salt issuing *de terris, tenementis, salinâ, &c.* in *Hertye*; the Assise being taken by Default, the Recognitors find that the Father of the Plaintiffs died seised in Fee of the said Rent, and that the Plaintiffs are his next Heirs: 'Quæsti iidem Recognitores qualiter iidem *Stephanus atte Cherche* Clericus, & *Nicholaus* sunt propinquiore hæredes ipsius *Stephani atte Cherche* patris, dicunt quòd tenementa, unde redditus ille provenit, sunt de Gavelkynde & partibilia inter masculos, & a toto tempore exstiterunt, & redditus ille est ejusdem nature, & esse debet secundum Consuetudinem tenure illius: Quæsti iidem Recognitores cujusmodi redditus, redditus ille est, dicunt quod est redditus oneris.' And then they find the Plaintiffs Title to the Rent. 'Quæsti iidem Recognitores si redditus ille aliquo tempore post donum prædictum partitus fuit inter masculos, dicunt quod post donum prædictum non fuerunt duo filii simul alicujus antecessorum prædictorum *Stephani atte Cherche* Clerici, & *Nicholai*, inter quos partiri potuit, præter eisdem *Stephanum* & *Nicholaum*, (and then they find the Damages) Et viso & diligenter examinato veredicto prædicto, Consideratum est quod prædictus *Stephanus atte Cherche*, Cler. & *Nicholaus* recuperent seisinam suam de redditu prædicto, &c. & damna sua, &c.

Rent-

Rent-charge, Rent reserved, &c. shall follow the Nature of the Land. 22 Ed. 4. 10. b.

If a Rent be granted in Fee out of Gavelkind Land, it shall descend to all the Males. *Lamb. Peramb.* $\frac{996}{347}$.

Said by *Fitzberbert* and *Pollard*, Justices, and not much denied, that if Rent is granted out of Land which is Customary, as *Borough English* or Gavelkind, or where Dower is of a Moiety, & *hujusmodi*, the Rent shall be of the Custom and Nature of the Land, tho' the Rent is granted out of the Land within Time of Memory, or at this Day. 14 H. 8. 7 & 9. *Bro. Rents*, 20. *ibid. Custom*, 65.

And the Opinion of *Fitzberbert* and *Norwich*, 26 H. 8. 4. b. just before cited.

In Ancient Boroughs, where Lands and Tenements are deviseable by Will, a Man seised of a Rent-Service, or Rent-Charge may devise it. *Litt. Sect.* 585. 1 *Inst.* 111. a.

But this Question is at length put in Peace by a later Determination :

The Question was, whether a Rent charge granted out of Gavelkind Lands to a Man and his Heirs should go to the Heir at Common Law, or be partible among all the Sons ; and after solemn Argument by two *Kentish* Counsel, and Consideration of all the Cases, the Court held that the Rent ought to descend to all the Brothers according to the Descent of the Land, because the Rent is Part of the Profits of the Land, and issues out of the Land. *Randall* and *Jenkins*, 1 *Mod.* 96. 2 *Lev.* 87. 3 *Keb.* 214. cited - 1 *Vern.*

Book I.



1 *Vern.* 489. The same Point was ruled in the Case of *Stokes* and *Verrier*, 3 *Keb.* 292. 1 *Mod.* 112. on the Authority of the foregoing Case. And the same Thing is affirmed by *Holt*, *Ch. Just.* *Salk.* 244.

3 *Lev.* 370.*Carth.* 307.

And in 2 *Lutw.* 1205, 1210. *Osmer* and *Sheafe*, is a Conufance made in the Name and Right of a younger Brother for his Purparty of a Rent-charge granted to his Ancestor in Fee out of Lands in Gavelkind, and Judgment for the Conufant. Indeed the Reporter properly doubts whether the Conufance being for Part of the Rent only was good: For it is adjudged in the Case of *Page* and *Stedman*, *Carth.* 364. that Coparceners cannot sever, but must join in Avowry for Rent, and where one Sister distrains she must avow in her own Right, and likewise make Conufance as Bailiff to her Sister for the entire Rent, and not for a Moiety only in her own Right. And the like Determination is concerning Jointenants of a Rent-charge. *Carth.* 328. *Pullen* and *Palmer*. And the same Rule is allowed between Parceners of a Seignior in Gavelkind distraining for Rent-Service. 7 *Ed.* 3. 38, 39. *Avowry* 150.

But if the Rent be issuing by one entire Grant out of Lands of different Natures, they who claim under the Custom will have no Share in the Inheritance, but the Common Law Descent will be preferred to the whole as the most worthy.

Rent

Rent *granted* out of Land at Common Law and *Borough English*, descends according to the Common Law. 1 *And. 191. obiter.*

If Rent is *granted* out of Land of the Custom of Gavelkind, and out of Land at Common Law, and the Grantee dies having divers Sons, the eldest only shall have the whole Rent. *Marginal Notes to Dyer, 5. b.* And in the Case of *Randal* and *Roberts*, *Noy 15.* It was adjudged in *Replevin*, that if a Man seised of Land in *Soke-Fee* [which is to be understood Land at Common Law, *per Hale Ch. 7. 3 Keb. 215, 216.*] and Gavelkind, grants a Rent-Charge out of them to *B.* in Fee, and *B.* dies, having Issue three Sons, the eldest only shall have all the Rent.

But if Rent is *reserved* out of Land of two Customary Natures, as if a Man make a Lease for Years of two Acres of Land, one in Gavelkind and the other in *Borough-English*, and has Issue two Sons, and dies, the Rent shall be apportioned, because it descends to them by Course of Law. *Dyer 5. a.* Tho' the true Reason seems to be, that it is incident to the Reversion.

And indeed the Law will be the same equally in the Case of a Rent *reserved* out of Gavelkind Lands, and Lands at Common Law, as such Rent is incident to the Reversion, and apportionable on the Severance of it either by Act of Law, or Act of the Party. *Co. Litt. 148. a. 215. a.*

A Man seised of two Acres, the one in Fee, the other in *Borough-English*, has Issue two Sons, and lets both Acres for Life or for

Book I.



Of Tithes
out of Gavel-
kind Lands.

for Years, rendering Rent, with Condition of Re-entry; the Lessor dies; by this Descent which is an Act in Law, the Reversion, Rent and Condition are divided. 4 Rep. 120. b. *Dumpor's Case.* 1 Roll. Rep. 331.

Parsonages, Tithes, &c. that came to the Crown by the Statutes for the Dissolution of Monasteries, &c. are made by those Statutes and that of 32 H. 8. 7. in the Hands of Laymen, temporal Inheritances, and Husbands may be Tenants by the Curtesy, and Wives endowed of them. Co. Litt. 159. Upon which may possibly arise a Question of some Importance, whether Tithes impropriate issuing out of Gavelkind Lands shall descend to the eldest Son, or go according to the Custom of the Lands out of which they arise. And the like Doubt may be made concerning Dower, and Tenancy by the Curtesy. But it will be very difficult to maintain that these new Inheritances can be directed or controuled by the Custom, since they were within Time of Memory Duties merely Ecclesiastical, collateral to the Estate of the Land, and are in no Part of the old Lay-Fee.

11 Rep. 13. b.

I can find no Case in the Books in Point to this Question, (possibly because never accounted of any Difficulty) save one in *Hughes's Abridgment, Title Customs*; which Book I cite not as of any Authority, but only as it may occasion a further Search, if it should ever be thought proper to litigate this Point. The Name of the Case is omitted, but it is *Mich. 10 Jac. 1.* A Man is seised of Tithes of Corn

Corn arising out of the Manor of *D.* which is *Borough-English*; the Question was who should have them, the Elder or Younger Son: The Opinion of the Court was that the Eldest should have them, because Tithes do not come naturally of the Land, but by manual Occupation. Also of Common Right Tithes are not an Inheritance descendible, and by the Statute of Monasteries it is only that they are descendible to Heirs.

Chap. V.

Before I conclude this Chapter, I shall take Notice how generally this Custom of Gavelkind formerly obtained throughout the whole County of *Kent*; for tho' it is confined to Tenements of Socage Tenure, yet there were fewer Lands anciently holden by Knight-Service in this than perhaps in any other County of the Kingdom; insomuch that it is said in *Pasc. 18 Ed. 2. Mayn. 610.* That *all* the Land in *Kent* is holden in Socage. But this is not to be taken literally, for it is plain by the *Milites Archiepiscopi* in *Domesday*, that Military Tenures were introduced into this County soon after the Conquest: And there are frequent Instances on Record in the *Kentish* *Lives* of Lands holden by Knight-Service; as in *39 H. 3. Rot. 18. in dorso. 43 H. 3. Rot. 4. 55 H. 3. Rot. 20. 38. in dorso. 52. in dorso. 21 Ed. 1. inter Plac. Coron. Rot. 41. and Hil. 10 Ed. 1. C. B. Rot. 27.* So in this very Reign of *Edward the Second*, *Mich. 9 Ed. 2. C. B. Rot. 240. Ante 56.* And in *Itin. Kanc. 6 Ed. 2.*

Book I. *Ed. 2. Plac. Coron.* the Juries of the several Hundreds throughout the County, are charged to enquire *de feodis*, and accordingly find who held Lands in *Capite* within their several Districts, as may be seen *Rot. 19, &c.*

However it appears by *Stat. 18 H. 6. 2.* that at that Time the Number of Military Tenants in this Shire was very inconsiderable, the Act taking Notice that there were within the County of *Kent* but thirty or forty Persons at most, which had any Lands or Tenements out of the Tenure of Gavelkind, because the greater Part of the County, or *well nigh all*, was of the Tenure of Gavelkind.

Indeed the Quantity of Lands exempt from this Custom as to the Quality of Partition was much encreased by the disgavelling Statutes; and this perhaps may have given Occasion to a common Mistake, which I have met with among Strangers to this County, that there now remains in it but little Land of the Nature of Gavelkind.

But, the Presumption of Law, that all the Lands in this County are Gavelkind, is a great Friend to the Custom; and if we consider the Difficulty complained of even in the last Age, and now grown much greater, of proving what Estates the Persons comprehended in the Disgavelling Statutes were seised of at the Time of making those Acts, together with that of shewing what Lands were formerly Knight-Service,

*1 Sid. 138.
Wifeman and
Cotton.*

Service, which is a Difficulty encreasing every Day since the Abolition of Military Tenures, and the Expence attending the Search of Records for Evidence of this *Kind*, I believe I should not seem much mistaken, were I to assert, that there is now near as much Land in this County subject to the Controul of the Custom, as there was before the Disgavelling Statutes were made.

C H A P. VI.

Of the Nature of Gavelkind in Point of
Descent and Partition; and of the Re-
medies for and against Parceners by
the Custom.

Ante 41.

HAVING shewn in general what Lands within the County of *Kent* are of the Nature of Gavelkind, I shall now enter more particularly into the several Properties of the Custom, and in this I shall follow the Order of the Division before made, first treating of the *general*, and then of the *special* Customs: And Partibility being the primary and more eminent Quality of Gavelkind, I shall in the first Place speak of that, and its Consequences, *viz.* The Remedies given by Law to or against Parceners by the Custom, either for the Land, or by Reason of the Land.

Descent of
Lands in Ga-
velkind in the
Right Line.
*Customal of
Kent* 574.
Litt. sect. 265.

The Descent of Lands in *Gavelkind* in the Right Line is so well known to be among all the Sons, and in Default of them to the Daughters, that it is needless to multiply Authorities concerning it; especially as it is taken Notice of by the Statute 17 *Ed. 2. De Prærog. Regis. c. 16.* "In *Kent* in Gavelkind
" all Heirs Males shall divide their Inheri-
" tance, and likewise Women; but Women
" shall not partake with Men."

But

But though Females claiming in their own Right are postponed to Males, yet it is to be understood that they may by Representation inherit together with them. For it is not to Descents according to the Course of the Common Law only that the Right of Representation is confined, but it holds also in Inheritances descendible according to Custom; and indeed has been taken Notice of by the Laws of all Countries: And therefore, if a Man has three Sons, and purchases Lands in Gavelkind, and a younger Son dies in the Life of his Father leaving Issue a Daughter, without Doubt the Daughter shall inherit the Part of her Father; and yet she is not within the Words of the Custom (*inter hæredes masculos partibilis*) for she is no Male, but the Daughter of a Male coming in his Stead by Representation. Indeed, had the Purchase been to the Father and the Heirs Males of his Body, the Daughter had been excluded *per Formam Doni*; but the Custom making the Land descendible to the Heir Male, makes Room for the Representative of him. *Per Holt*, Ch. Just. in delivering the Opinion of the Court in the Case of *Clement* and *Scudamore*, 6 Mod. 121. *Salk.* 243. 1 *Peere W.* 63. 2 *Ld. Raymond* 1024, 1025.

And the same Fiction of Representation holds in *Borough English*; for there is no Difference between Gavelkind and *Borough English* but in the Quantity of the Land taken by the Heir; in Gavelkind each Son taking an equal Part, but here the youngest Son takes the whole, which will not vary the Reason in Construction of the Custom:

Chap. VI.

By Representation.

2 Inst. 593.
Lamb. Peram.
606.
Somn. 7.
Dyer 237.
Post.



And since this Custom alters the Descent from the Eldest to the Youngest Son, there is the same Reason that the Representative of the Youngest shall take, as there is at Common Law for the Representative of the Eldest. *Ibid.*

And though the Father purchased not the Lands in Gavelkind till after the Death of one of his Sons, yet the Representative of such Son shall be admitted in his Stead; as appears from the principal Case of *Clement and Scudamore*, which was this: *A.* had five Sons, and the youngest died in the Life of his Father, leaving Issue a Daughter, after which the Father purchased Copyhold Lands of the Nature of *Borough English*, which by the Custom were descendible to the Youngest Son and his Heirs; and the Court upon Consideration were of Opinion that the Daughter of the fifth Son should inherit *jure Representationis*, for the Custom having made the youngest Son Heir, the Law implies all necessary Incidents and Consequences in Point of Descent. *Salk.* 243. 6 *Mod.* 120. 1 *Peere W.* 63.

In the collateral Line.

Nor is the partible Quality of Gavelkind Land restrained to the Right Line only, but in Default of lineal Heirs, by the Custom of *Kent* when one Brother dies without Issue all the Brothers shall inherit. *Co. Litt.* 140. *a. Skin.* 385. *Somn.* 7. *Spelm. Glossary sub verbo Gaveletum.* 23 *Aff.* 12. And this was taken for granted in the Case of *Guge and Woodwin*, *Mich.* 8 *Geo.* 2. Where the Contest was between two Brothers on the Death of a Third.

And

And in Default of Brothers their respective Issue shall take *Jure Representationis*, but then the Nephews succeeding with their Uncle the Descent is *in Stirpes*, and not *in Capita*. Chap. VI.
26 H. 8. 4.
b. Skin. 385,
562. *Brewster*
and *Hussey*.
Somn. 7. And so from the Nature of the Thing it must be where the Sons of several Brothers succeed, no Uncle surviving; for though in equal Degree, they stand in the Place of their respective Fathers.

This Extension of the Customary Descent to the collateral Line is a greater Favour than is allowed to other Customs; for *Borough English* is confined to the youngest Son only, and if he die without Issue, the youngest Brother shall not inherit Land of that Nature, except it be by some special Custom, for Customs ought always to be taken strictly. *Co. Litt.* 110. *b.* 1 *Roll's Abr.* 623. *A.* 2. *Godb.* 166. 2 *Roll. Rep.* 368. 4 *Leon.* 242. *Cro. Jac.* 198. *Bailey and Stevens.* And *Cro. Car.* 411. and *W. Jones* 361. in *Reeve and Master* agreed by the Court. Which Authorities are sufficient to overthrow the Saying of *Williams Justice* to the contrary in 1 *Bulst.* 93.

And if the youngest Son having Lands in *Borough English* die, leaving only Nephews, the eldest Nephew shall take. 1 *Roll's Abr.* 624. *pl.* 2.

So if the Custom of a Copyhold be that the eldest Daughter, in Case there be no Sons, shall take the whole, the eldest Sister is not within the Custom. *Chapman's Case*, 2 *Roll's Rep.* 368. *Godb.* 116. *Rapley and Chapman.* Nor the eldest Aunt. 1 *Roll's Abr.* 623. *A.* 1.

Book I.

And though the Custom be that the eldest Sister shall inherit, yet it extends not to the eldest Aunt or Niece. 4 *Leon.* 242. *Ratcliffe* and *Chaplin.* *Godb.* 166. *S. C.*

Of Gavelkind Lands in Tail. Neither is our Custom of Gavelkind confined to Inheritances in Fee-simple only; for though an Estate-Tail is a new Kind of Inheritance introduced within Time of Memory by the Statute *De Donis*, yet if a Man die seised of Lands in Gavelkind in Tail, whether general or special, all the Sons shall inherit together as Heirs of the Body. 11 *Ed.* 3. *Formedon* 30. 11 *H.* 6. 43. *b.* *Litt. Sect.* 265. 26 *H.* 8. 4. *b.* 1 *Rep.* 101. *a.* 103. *a.* *Noy* 106. For it is Part of the old Fee-simple, though the Tail be created *de novo.* 1 *Mod.* 196.

And in like Manner, if Lands in *Borough English* are given to a Man and the Heirs of his Body, the youngest Son shall take. 11 *Ed.* 3. *Formedon* 30. *Litt. Sect.* 603. *Co. Litt.* 110. *b.* *Noy* 106. *Weeks* and *Carvel.*

But a special Custom in *Borough English* Lands, that the youngest Son shall take an Estate in Fee, but the Eldest an Estate Tail, is a good Custom. *March* 54. *Chapman* and *Chapman.*

Devise of Gavelkind Lands to three Brothers, &c.

One *Fairman* seised of Gavelkind Lands had three Sons, and devised Part to one, Part to another, and Part to a third, and if any of them died without Issue, then the others to be his Heir; this was adjudged an Estate Tail in each, Remainder over in Fee by Reason of the Word Heir. *Sparke* and *Purnell,* *Moor* 864.

In *Dyer* 133. pl. 5. is put this Case: A Man seised of Lands in Gavelkind by his last Will devises them to Husband and Wife for their Lives, Remainder *Proximo Hæredi Mascululo de corporibus suis legitime procreato imperpetuum*; and afterwards the Husband and Wife have issue three Sons, and die; if the eldest Son shall have the Whole, or in Common with his Brothers, was the Question:

Chap. VI.
Whether
Gavelkind
Lands devised
to a Man and
his Wife for
their Lives,
Remainder to
the next Heir
Male of their
Bodies for
ever, is a De-
vise in Tail?

By a Manuscript Note which I have seen of this Case, it came in Debate on a Replevin brought by *Antony May* against *John Milton* and *John Hammond*; and *Portman, Ch. J.* and *Whiddon, Just.* were of Opinion that all the Sons should inherit; but *Dalison Just.* held that the eldest Son should take the whole by Purchase, and have a Fee by Reason of the Word *imperpetuum*.

The Question turns upon this, whether the Words of this Devise create an Estate in special Tail in the Husband and Wife; for then all the Sons may inherit; but if on the contrary the Words *next Heir Male* being in the singular Number, are to be taken in this Will, as they would in a Deed, to be only Words of Purchase, there can be no Doubt but the eldest Son will take the Whole.

It is certain such a Devise of Lands descendible according to the Course of the Common Law would create an Estate Tail in the first Taker, as appears by the following Cases:

Devise to a Man for Life, Remainder to the *next Heir Male*, and for Default of such

Book I. Heir Male to remain, adjudged an Estate Tail. *Burley's Case*, cited 1 *Vent.* 230.

Devise to *Serjeant Miller* and his Wife for their Lives, Remainder to *the next Heir Male* of their two Bodies; held, that this was a Devise in Tail; for a Devise to the Heir Male is a Devise in Tail, unless there are Words of Limitation superadded so as to bring it within the Reason of *Archer's Case* (1 *Rep.* 66.) But the Words *First*, *Next*, or *Eldest*, or any like Words superadded, make no Difference. *Miller and Seagrave*, *Mich.* 10 *Geo.* 1. *B. R.*

Sir Tho. Trollop devised the Manor of *A.* to his first Son *William* for Life, Remainder to the Heirs Males of his Body, Remainder to his second Son *Thomas* for Life, and after his Death to the *first Heir Male* of his Body, Remainder to his third Son *Christopher* and the Heirs Males of his Body, Remainder in like Manner in Tail Male to the fourth, fifth, &c. Sons: The Court held that the Words *Heir Male* were to be understood collectively, and that *Thomas* the second Son took an Estate Tail, it appearing that such was the Testator's Intention by the other Devises; and this stands distinguished from *Archer's Case*, no Limitation being superadded to the Words *first Heir Male*, and the Word *First* shall be understood first in Order of Succession from Time to Time. *Dubber* on the Demise of *Trollop v. Trollop*, *East.* 8 *Geo.* 2. *B. R.* which affirmed the Judgment of *C. B.*

And, it seems, with equal Reason may the Word *Heir* be understood as *Nomen Collectivum*, if the Lands be Gavelkind, as all the

the Sons are in Judgment of the Law but one Heir: And then the Words in the principal Case will create an Estate in Special Tail in the first Takers, which will descend to all the Males; for the Law will without Difficulty reject the Word *next*, in Favour of the Customary Inheritance, or it may naturally enough be taken to signify the nearest in Course of Succession from Time to Time. *

Nor are Estates of Inheritance only transmitted to all the Sons according to the Custom, but Freeholds descendible are also of the same Nature; as if a Lease is made of Gavelkind Land to a Man and his Heirs *pur auter vie*, the Heirs by the Custom, after the Death of their Father, &c. shall be the special Occupants: In like Manner, as if Lands of the Nature of *Borough English* be letten to a Man and his Heirs during the Life of *J. S.* and the Lessee dies in the Lifetime of *J. S.* the youngest Son shall enjoy the Lands. *Co. Litt.* 110. *b.* *Salk.* 244. *per Holt.* And the same Point was adjudged between *Baxter* and *Dowdeswell*, by Lord *Hale* and the Court of *B. R.* 2 *Lev.* 138. 3 *Keb.* 475, 486, 498. And cited in 2 *Vern.* 226. tho' objected that it was only a special

Estates *pur auter vie* of Gavelkind Lands.

* In *Lovelace's Case*, cited *Moor* 371. A Devise of Gavelkind Land to a Man and his *Eldest* Issue Male (he having no Son at that Time) was adjudged no Estate Tail, but for Life only. But the Case is reported in several other Books. *Cro. Eliz.* 40. 2 *Leon.* 35. 1 *And.* 132. *Sav.* 75. in none of which is any Notice taken that the Lands were Gavelkind.

Book I.



Of Gavel-
kind in Copy-
holds.

2 *Sid.* 61.
Style 145. S.
C. argued,
but not ad-
judged.

Limitation to prevent an Occupancy; for he takes as Heir.

If Copyhold Lands descendible after the Manner of Gavelkind are surrendered to the Use of a Man and his Heirs who dies before Admittance, yet the customary Descent shall take Place; according to the Reason of the Case of *Barker* and *Denham*, 1 *Mod.* 102, 1 *Vent.* 261. Copyhold Land of the Custom of *Borough English* was surrendered out of Court to the Use of a Man and his Heirs; the Surrenderee died before Admittance, leaving two Sons; and the Opinion of the Court was that the Right should descend to the youngest, according to the Custom.

But otherwise it is if the Custom be more Special, that the Land of every Tenant *dying seised* be divided among the Sons. In the Case of *Fane* and *Barr*, *Hil.* 1659. *Rot.* 779. The Custom was that the Copyhold Land of every Tenant *dying seised* descended to the youngest Son: A Surrender was made to the Use of *A.* and his Heirs; *A.* died before Admittance: And it was agreed the youngest Son should have inherited, if *A.* had been admitted; but in this Case *A.* not having been admitted, it was adjudged that the eldest Son should inherit, and that by Reason of the Strictness of the Custom which required a Seisin and a dying seised. But the Court said it had been otherwise had this Land been found to be of the Custom of *Borough English* or Gavelkind. Cited by *Holt Ch. J.* in the Case of *Clement* and *Scudamore*, *Salk.* 243.

A Man

A Man seized of Copyhold Lands descendible after the Manner of Gavelkind, devised them to his eldest Son, but without a Surrender to the Use of his Will; and Equity supplied this Defect, being in Favour of the eldest Son, who was as much entitled to this Relief in the present Case, as a younger Son is, where Copyhold Lands descendible at Common Law are devised to him. 2 Vern. 163. *Bradley and Bradley.*

But as Equity will not supply the Want of a Surrender to the Use of the Will in Favour of younger Children, if it would totally disinherit the Heir at Law, or put the Younger in a better Condition than the elder Brother; so on the other Hand, where a Father devised a Copyhold of the Tenure of *Borough English* to his eldest Son, and devised Houses in *London* to his youngest Son, and died without having surrendered to the Use of his Will, being prevented by the Plague: And the Houses in *London* intended as a Provision for the youngest Son were soon after burnt down, he being then an Infant, and never having entered thereon, or received any Part of the Profits; the Court, as the Case was circumstanced, refused to supply the Defect of a Surrender. *Cooper and Cooper*, 2 Vern. 265.

I have seen a remarkable Record of a Whether one Plea between *Bedyll and Croutber*, B. R. Parcener of *Mich. 11 H. 8. Rot. 88.* wherein the Defendant pleads that the Lands are of the Nature of Gavelkind in the County of *Kent*, and "that it is, and from Time whereof the Memory of Man is not to the contrary,

the Half-Blood of Lands in Gavelkind shall inherit to the other.

Book I.



“ trary, in the said County of *Kent* by the
 “ Custom of the said County has been used,
 “ that whensoever two Heirs Males Copar-
 “ ceners of the *Half-Blood*, of *whatsoever Pa-*
 “ *rent begotten*, have inherited any Lands or
 “ Tenements of the said Nature or Tenure of
 “ Gavelkind in the said County, and either
 “ of these Heirs has died seised of his Pur-
 “ party of such Hereditaments without Heir
 “ of his Body, then the other surviving Heir,
 “ Coparcener of the said Heir so dying, might
 “ inherit, and for the whole Time aforesaid
 “ was inheritable, has inherited, and ought
 “ to inherit according to the Custom the
 “ Purparty of all the Lands and Tenements
 “ of the said Nature or Tenure of Gavel-
 “ kind of the said other Heir, so without
 “ Heir of his Body dying.” And then makes
 Title to the Lands accordingly. And the
 Plaintiff takes Issue on this Custom, which
 the Court after mature Deliberation, and
 having advised with the Justices of *C. B.* sent,
 as it concerned the Commonalty of *Kent*, to
 be tried by a Jury of the Body of the Coun-
 ty: But there is no Verdict, nor further Pro-
 ceedings entered on the Roll.

Post. lib. 2.
 c. 7.

1 Roll. Abr.
 628. pl. 14.

V. M. 19 Ed.
 2. Mayn.
 628. and
 Fitz. *Quare*
Impedit, 177.

But still this Question may be settled by
 other Authorities; and as the Half Blood
 is an Impediment by the Common Law
 to the Descent of the Purparty of one Fe-
 male Parcener to her Sister by a different
 Venter, equally as in other Cases, notwith-
 standing a Notion that anciently prevailed to
 the contrary; so the following Cases will
 shew it to be the same as to Parceners by
 the Custom.

‘ *Itin.*

* *lin. Kanc. 55 H. 3. Inter Plac. de Juratis* Chap. VI.
 & *Affis de Civitate Cantuar. rot. 6. Jurata* }
 loco *Affisæ Mortis Antecessoris, secundum* *Affise of*
 Consuetudinem Civitatis *Cantuar. venit re-* *Mortdances-*
 cognitura si *Henricus* filius *Bretun del Mar-*
 reys, frater *Johannæ* uxoris *Johannis* filii
Willi, & Emmæ uxoris *Roberti de Kingston,*
 fuit seifitus in Dominico suo ut de feodo de
 medietate Messuagii ac viginti solidorum
 redditus, & decem acrarum terræ in Subur-
 biis *Cant. & medietate quatuor acrarum*
 terræ cum pertinentiis in *T. die quo, &c.*
 & si, &c. Quas medietates prædictorum
 Messuagii redditus & terræ *Thomas* filius
Willi Culbill & Henricus frater ejus tenent:
 Qui veniunt & dicunt quod *Jurata* non
 debet inde fieri, quia dicunt, quod præ- } *Tenants*
 dictus *Henricus*, de cujus morte, &c. obiit *plead that*
 seifitus de prædictis Tenementis, & quod *they are Bro-*
 ipsi post mortem prædicti *Henrici* intraverunt *thers and*
 in prædicta tenementa ut fratres & hæredes *Heirs.*
 ipsius *Henrici*, unde petunt judicium si
Affisa jaceat inter ipsos deficut ipsi & præ-
 dictæ *Johanna & Emma* clamant per unum
 & eundem descensum.
 Et *Johannes & Johanna, Robertus &* } *Reply, that*
Emma dicunt quod prædictum Messuagium *the Plaintiffs*
 & redditus fuerunt jus & hæreditas cujus- *are Sisters of*
 dam, *Cbristianæ*, quæ habuit duos viros, *the whole,*
 de quorum primo habuit prædictum *Tbo-* *nants but Bro-*
 nam & *Henricum*, & de secundo prædictum *thers of the*
Henricum, de cujus morte, &c. & præ- *half Blood.*
 dictas *Johannam & Emmam*; & dicunt
 quod prædictus *Henricus* frater ipsarum
Johannæ & Emmæ fuit in seifinâ de * Me-
 dietate prædicti Messuagii & redditus no-
 * *Qu. How*
 mine *Henr. was en-*
 titled to above
 a third Part.

Book I.

Judgment for
the Plaintiffs.

Assise.

Tenant
pleads that
H. died sei-
fed as of his
Purparty in
Gavelkind,
and she is
Heir of the
whole Blood,
and the Plain-
tiff is by ano-
ther Venter.

mine propartis suæ cum prædictis *Thomâ*
& *Henrico*, & inde obiit seifitus; unde dicunt
quod ipsæ *Jobanna* & *Emma* sunt hæredes
propinquiore prædicti *Henrici* fratris sui,
ex quo ipsæ sunt de eodem patre & eadem
matre, quàm prædicti *Thomas* & *Henricus*
qui tantummodo sunt fratres ejus ex parte
matris, desicut idem *Henricus* frater ip-
forum obiit seifitus de prædictis medietati-
bus prædictorum Messuagii & redditus.
Et prædicti *Thomas* & *Henricus* non possunt
hoc dedicere; Ideo Consideratum est quod
prædicti *Jobannes* & *Jobanna*, *Robertus* &
Emma recuperent seisinam suam de prædictis
medietatibus messuagii & redditus, & *Thomas*
& *Henricus* in miâ.

Itin. Kanc. 6 Ed. 2. Rot. 18. in dorso.
Assisa venit recognitura si *Will'us* filius
Will'i de *Horne* & *Elena* uxor ejus, &c.
injuste disseisiverunt *Jobannem Heymes* de
Fresingbeye de libero tenemento suo in *Ten-*
terden, &c. unde queritur quòd disseisive-
runt eum de uno Messuagio & quinq;
acris terræ.

Idem *Will'us* & *Elena* respondent ut
tenentes, & dicunt quod tenementa posita
in visu non continent in se nisi unum mes-
suagium & quatuor acras & tres rodas ter-
ræ, & quòd Assisa non debet inde fieri,
&c. quia dicunt quod tenementa illa si-
mul cum aliis tenementis dudum fuerunt
in seisinâ cujusdam *Hamonis* de *Fresingbeye*
ut jus ipsius *Hamonis*, qui habuit duas ux-
ores, scil. quasdam *Mabillam* & *Margeriam*,
& de prædictâ *Mabillâ* procreavit ipse præ-
dictum *Jobannem*, qui nunc queritur, & de
præ-



prædictâ *Margerid* procreavit quendam *Robertum* & prædictam *Elenam*, & dicunt quod post mortem prædicti *Hamonis*, qui de prædictis tenementis obiit seifitus in Dominico suo ut de feodo, &c. successerunt in iisdem tenementis prædicti *Johannes* & *Robertus* ut filii ejus & hæredes, &c. ita quòd tota Hæreditas, &c. partita fuit inter ipsos *Johannem* & *Robertum*; & quod tenementa nunc posita in visu, &c. assignata fuerunt in partem ipsius *Roberti*, qui inde obiit seifitus; &c. cui successit in eisdem quidam *Hamo* ut filius ejus & hæres, qui inde obiit seifitus, &c. post cujus mortem sine hæredibus de se, &c. resortiebatur Jus prædictæ *Elenæ* ut amitæ & hæredi, sorori prædicti *Roberti* patris prædicti *Hamonis*, &c. de sanguine integro, &c. unde petunt judicium, desicut idem *Johannes* est de alio ventre & non de sanguine integro ipsius *Roberti*.

Et *Johannes Heymes* bene cognovit quòd tenementa prædicta simul cum aliis tenementis fuerunt in seisinâ prædicti *Hamonis* de *Fresingbeye*, & quòd eadem tenementa partita fuerunt inter prædictum *Robertum* & ipsum *Johannem*, sed dicit quod tenementa ista in visu posita, & unde quer, &c. assignata fuerunt eidem *Johanni* in partem, &c. & idem *Johannes* inde fuit in seisinâ ut de libero tenemento suo per assignationem prædictam, quousque prædicti *Will'us* & *Elena* & alii in brevi nominati ipsum inde injustè disseisiverunt, & hoc petit quod inquiratur per Assisam, & *Will'us* & alii similiter.

Plaintiff replies, that the Premises were assigned to him as his Purparty, and not to H.

Postea

Book I.

Verdict and
Judgment for
the Tenant.

‘ Postea venerunt xii. Recognitores qui
‘ dicunt super sacramentum suum quod præ-
‘ dicta tenementa, quæ prædictus *Johannes*
‘ *Heymes* posuit in visu suo, & de quibus
‘ queritur, &c. assignata fuerunt prædicto
‘ *Roberto* in propartem suam, & non præ-
‘ dicto *Johanni*, unde dicunt præcise quod
‘ *Will’us* & alii non disseisiverunt prædictum
‘ *Johannem* sicut queritur. Ideo Considera-
‘ tum est quod prædictus *Will’us* & alii eant
‘ sine die, & prædictus *Johannes* nil capiat,
‘ &c. sed in mîa, &c.

In an Assise, *Plac. Ass. in Com. Kanc. 3 Ed.*
2. by *Robert Bishop* and *Godeline* his Wife
against *John* Son of *Edm. de Herberdefield*, &c.
for Lands in *Staplehurst*, &c.

Assise.

Verdict, that
the Plaintiff
is Sister of the
whole, and
the Tenant
Brother, but
of the half
Blood to *W.*
who died
seised of the
Premises as
of his Purpar-
ty in Gavel-
kind.

N. B. A Ver-
dict of much
the same Na-
ture was
found be-
tween the
same Parties

in an Assise brought *Anno 35 Ed. 1.* and occurs *Mich. 3 Ed. 2. Coram Rege, Rot. 105. Kanc.*

‘ Juratores dicunt super sacramentum suum,
‘ quod prædicta tenementa aliquo tempore
‘ fuerunt in seisinâ cujusdam *Edmundi de*
‘ *Hardburch*, qui desponsavit quandam *Ju-*
‘ *lianam*, & ex ea procreavit quandam
‘ *Will’um* nomine & præfatam *Godelinam*,
‘ quæ modo queritur, quæ quidem *Juliana*
‘ postea obiit, post cujus mortem ipse *Ed-*
‘ *mundus* desponsavit quandam *Dyonisiam*, &
‘ ex eâ procreavit quandam filium *Johan-*
‘ *nem* nomine; & dicunt quod prædictus
‘ *Edmundus* postea obiit, post cujus mor-
‘ tem prædicti *Will’us* & *Johannes* intra-
‘ verunt in prædictis tenementis, & ea te-
‘ nuerunt in communi secundum *Consuetu-*
‘ *dinem de Gavelkynde* per quatuor annos &
‘ amplius, & dicunt quod prædictus *Wil-*
‘ *helmus* postea obiit, post cujus mortem

‘ præ-

prædicta *Godelina* intravit in integro prædictorum tenementorum, ut soror & hæres prædicti Will'i ex eodem patre & ex eadem matre, & fuit seifita in communi cum prædicto *Johanne* fratre ejus de integro prædictorum tenementorum, quousque prædicti *Johannes* filius *Edmundi* & *Johannes Meylyeme* ipsam inde injustè disseisiverunt: Et ideo Consideratum est quòd prædicti *Robertus* filius *Roberti* & *Godelina* uxor ejus recuperent inde seifinam suam per visum Recognitionum, & damna sua, &c.

Judgment for the Plaintiff.

Having treated of the Sons Right to the Gavelkind Inheritance in its several Branches, it may be proper to shew the Remedies given by Law for the Recovery of that Right; the more briefly indeed, because some of them are at present disused.

Remedies for Parceners in Gavelkind.

The Law has generally provided the same Writs and Remedies for Parceners by the Custom, as it has for Female Parceners.

As a *Nuper obiit*, where one of them enters on the whole Land on the Death of the Ancestor, and deforces the other, F. N. B. 197. b. if the Ancestor died seised; But if he died not seised, as if the Ancestor had made a Lease for Life, and one Coparcener enters after the Death of Tenant for Life upon the whole, then the other ought to sue a Writ of Right *de Rationabili Parte* against him. F. N. B. 9. b. And these Writs lie between none but Privies in Blood. *Ibid.*

But an Assise of *Mortdancefor* lies not for one Brother for Lands in Gavelkind against the other, because of the Privy of Blood, no more than for one Daughter against

Book I.



against another. *F. N. B.* 196. *L. Brañ. lib.* 4. f. 261, 283. *Co. Litt.* 242. a.

These Writs *de Rationabili Parte* and *Nuper obiit*, lie only for one Parcener in Fee-simple against the other. *F. N. B.* 9. & 197.

In Tail.

But there are other Remedies proper to Parceners in Tail :

As a *Formedon*, where all the Sons are entitled to Gavelkind Lands entailed, as Heirs of the Body ; and the Writ shall be in the common Form, as the Writ of *Formedon* brought by Daughters, but by their Count they shall shew the Custom, and make the Descent to them as Heirs in Gavelkind. 11 *Ed.* 3. *Formedon*, 30. 11 *H.* 6. 44. b. *F. N. B.* 217. A.

And the same it is in *Borough English*; the youngest Son taking the Lands entailed shall have a Writ of *Formedon* in the Common Form *ut quæ descendere debent* to the Demandant *ut filio & heredi de corpore*, &c. but by the Count he shall alledge the Descent to him as youngest Son by the Usage. 11 *Ed.* 3. *Formedon*, 30. 13 *H.* 4. *Garrantie*, 94.

If Lands in Gavelkind be entailed, and descend to many Brethren as Heirs to their Father, and they make Partition betwixt them of the Lands, and afterwards one aliens his Part and dies, his Heir shall have a *Formedon* of that which they held in Parts. *F. N. B.* 214. B. Where see the Form of the Writ.

And where two, Heirs in Gavelkind, hold Lands in Coparcenary without any Partition made, and one dies, leaving Issue, and the other

other enters and ousts the Issue, such Issue shall have a Writ of *Formedon* (in *Descender*) in the *Infimul tenuit* against the other Coparcener who deforced him of his Land. *F. N. B.* 216. *A.*

And the same Writ lies against a Stranger where he ousts the Issue in Tail of one Parcener; or if the Father of such Issue had made a Feoffment in Fee to a Stranger; or for a Coparcener against a Stranger, who enters on the Death without Issue of the other Heir, who held the Lands undivided; or if such other Coparcener had aliened his Part to a Stranger in Fee. *Ibid.* And see there the Form of the Writ.

Lands in Gavelkind are granted, and rendered by Fine to a Man and his Wife, and the Heirs Males of their Bodies, and they die before Execution sued; the Heirs bring a *Scire Facias* against the Terretenants to have Execution, in the Writ they shall make the Descent to themselves generally, but in the Count they shall shew the Custom of *Kent*, and that the Lands descended to them as Heirs Males by the Custom. 11 *H. 6.* 43. *b.* 44. *b.*

Other Remedies there are common to all Parceners.

Remedies common to all Parceners. Error and Attaint.

All the Sons shall join in an Attaint, or Writ of Error, to reverse an erroneous Recovery of Gavelkind Lands. *Finch's Law* 16. *Lamb. Peramb.* $\frac{628}{345}$. The same shall the youngest Son have for *Borough English* Lands. *Finch's Law* 16. *F. N. B.* 21. *M. W. Jones* 361. 3 *Leon.* 261. 4 *Leon.* 5.

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Owen 68. for these follow the Nature of the original Action.

If there be a Brother and a Nephew, or others in different Degrees Parceners in Gavelkind they are within the Statute of *Glocester, c. 6.* to join in a Writ of *Mortdancestor.* 2 *Inst.* 308.

Age.

Heirs in Gavelkind shall have their Age in all Actions, which in their Nature will admit of that Delay, in the same Manner as Female Parceners; and the youngest Son being Heir by the Custom of *Borough English* shall have his Age, or the Parol shall demur, as it would in the Case of Inheritances at Common Law. *Salk.* 243. 6 *Mod.* 122.

Aid.

One of the Heirs in Gavelkind after Partition being impleaded in a *Præcipe* for his Purparty shall have Aid of the other. 1 *Roll. Abr.* 182. *pl.* 17. 11 *H.* 4. 22. *b.* 17 *Ed.* 3. 2. *b.* 12 *Ed.* 3. *Voucher*, 113. and innumerable Instances in the *Kentish Iters.*

Of the Writ
and Manner
of Partition.

A Writ of Partition lies between Heirs in Gavelkind, as well as between Female Parceners, but in the Declaration they ought to make mention of the Custom*. *Litt. Sect.* 265.

* Accordingly see the Form of the Declaration on a Writ of Partition between Parceners in Gavelkind. 1 *Brownl. Decl.* 150. *Herne* 531, 534, 537, 538. And see the Form of an Indenture of Partition by Consent between two Heirs in Gavelkind. *Rass. Ent.* 452.

Three Sons Heirs in Gavelkind in *Kent*, the youngest aliens his Purparty in Fee, the Alienee and the second Son join in a Writ of Partition against the Elder, and the Writ was *secundum formam Statuti* 31 H. 8. 1. which is for a Partition among Jointenants and Tenants in Common: And the Writ was abated by the Court; for the second Son is neither Tenant in Common, nor Jointenant with the Elder, and therefore he cannot join in this Writ with the Alienee; but they are entitled to several Writs of Partition, the Son to a Writ at Common Law, and the Alienee upon the Statute; but they cannot join. *Ballard and Ballard*, *Dyer* 128. O. *Bendl.* 20. *N. Bendl.* 42. 1 *And.* 30. *Dyer* 243. *Co. Litt.* 175. b.

And in such Case the two Sons might have a Writ of Partition at Common Law against the Alienee, but not upon the Statute. O. *Bendl.* 20. *N. Bendl.* 152.

And if two Coparceners join against the Alienee in a Writ of Partition at Common Law, and one of them does not proceed, yet he may be summoned and severed, and his Part shall be parted and severed, as well as the other Parts. *Dyer* 243. The Reporter indeed adds a *Quere* to this, but, as it seems, a little unnecessarily; for there can be no Colour to say that the Nonsuit of one Demandant is the Nonsuit of both in this, any more than in other real Actions; but the Parcener who makes Default may be summoned and severed, and the other proceed to Judgment; and then of Course on the Partition made in this Adversary Way each

V. Co. Litt.
139. a.

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Parcener must have his Part assigned in Severalty; though on a Partition by Consent between three Coparceners, a third Part may be allotted to one in Severalty, and the others still continue to occupy the rest in common as before. *Litt. Sect.* 276. And it is the less unreasonable that the Part of him not proceeding should be divided with the rest in this Case, because he does not by the Severance absolutely cease to be Party to the Record, but notwithstanding, if he dies, the Writ shall abate. *10 Rep.* 134. in *Read and Redman's Case*. So if a Writ of Error be brought, not naming him who was summoned and severed, the Writ shall abate. *9 H. 6.* 38. *Bro. Error*, 7.

The Manner of Partition among Parceners *ratione rei*, is much the same as among those at the Common Law, or *ratione personarum*; and therefore *Bracton* has treated of both indiscriminately in the same Chapter; if there be any Difference between them it is in the * Manner of di-

Lib. 2. c. 33.
p. 71.

* The Law concerning this Matter among Female Parceners is, that all Houses and Castles (except Castles for the necessary Defence of the Realm) ought to be parted among them, but these ought not to be divided. *1 Inst.* 165. And *Bracton*, *lib. 2. fol.* 76. And *Fleta*, *lib. 5. c. 9.* whom Lord Coke cites as his Authors, say, *si autem non nisi unicum sit Castrum, illud integrè remaneat Primogenito, ita tamen quod Postnato pro Parte sua satisfaciatur alibi ad valentiam.* And with this Restriction, that the eldest shall make Satisfaction, it seems are to be understood the Words of the Stat. *Hib. 14 H. 3. Cum Primogenita nihil plus petere possit quam alie sorores, nisi capitale Messuagium nomine Einencia.* And so is *Glanv. lib. 7. c. 3. Et vide Litt. Sect.* 251.

viding

viding the Chief House or Capital Messuage; Chap. VI.
concerning which I find nothing in the later Books, but *Glanville*, *Bracton*, and *Fleta*, Of Partition
speaking of such Socage Lands as were par- of the Capital
tible in their Times, treat of this Matter Messuage.

almost in the same Words. ‘ Si vero fuerit
‘ Liber Socmannus tunc quidem dividetur
‘ Hæreditas inter omnes filios, &c. Salvo
‘ tamen Capitali Messuagio primogenito
‘ Filio pro dignitate Æsneiciæ suæ, ita tamen
‘ quod in aliis rebus satisfaciat ad Valen-
‘ tiam. *Glanv. lib. 7. c. 3.* Et si unicum
‘ fuerit Messuagium, illud integre remaneat
‘ Primogenito, ita tamen quod alii habeant
‘ ad Valentiam de communi. *Bract. lib. 2.*
‘ *fol. 76. Fleta, l. 5. c. 9.* And the same
Authors had said a little before, ‘ Habet
‘ hoc Privilegium Primogenitus propter
‘ Æsnetiam, quod primam habebit Electio-
‘ nem, ut si plures participes sint ibi Cohæ-
‘ redes, & plura Capitalia Messuagia, pri-
‘ mogenitus primò eligat, & postea Postna-
‘ tus, & sic tertius, & quartus in infinitum,
‘ quamdiu superfuerit unicum Capitale Mes-
‘ suagium. Sed si complura ibi fuerint, non
‘ tamen tot, quod quilibet habeat unum,
‘ tunc illis, qui expertes sunt, de communi
‘ Hæreditate satisfiat ad Valentiam.

And if the House chosen by the Eldest,
where there are many, is of greater Value
than those which fall to the Share of the others,
it seems he ought to make Satisfaction to
his Brethren out of the rest of the Inheri-
tance, or by a Rent out of the House. *Vide*
List. Sect. 251.

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Indeed the Custumal of *Kent* sets up a different Kind of Partition; "Let the Mesuage be parted among them; but let the Hearth for Fire (*Astre*) remain to the Youngest, and be the Value of it delivered to each of the Parceners of that Heritage, from forty Feet from that Hearth, if the Tenement will so permit, and then let the eldest have the first Choice, and the others after their Degree. So of Houses, which shall be found in his Hands, let them be divided among the Heirs by equal Portions, that is to say, by Feet, if it may be, saving the Covert of the Hearth; which shall remain to the Youngest, as is aforesaid; so nevertheless that the Youngest make reasonable Composition with his Parceners for the Part which belongs to them, by the Award of good Men."

But we learn from Mr. *Lambard*, §24. that there is now no particular Regard paid either to the Eldest or youngest Son in making Partition, only Consideration is had that the Parts be equal and indifferent. Nor is it in the least strange that a Way of Division so inconvenient to all Parties should be disused.

Of Suit-Ser-
vice by Par-
ceners in Ga-
velkind.

Even after Partition of Gavelkind Lands, but one Suit shall be done for all the Parceners for such Tenements for which only one Suit was before due, but all the Parceners shall be contributory, according to their several Portions, to him that does the Suit for them. *Custumal of Kent, infra. Stat. Marl. c. 9. Vide 2 Inst. 119.*

The

The Entry into and Seisin of any one Brother of Gavelkind Lands is the Entry and Seisin of all the Brothers Coparceners with him. 43 *Ed.* 3. 19. *a.* 1. *Lutw.* 754. But this must be understood of a general Entry, and not where one enters claiming the whole to himself. *Co. Litt.* 243. *b.* 373. *b.* 43 *Ed.* 3. 19. *a.*

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Where the Entry of one Parcener is the Seisin of all.

But if there be three Coparceners in Gavelkind of a Reversion expectant on an Estate for Life and one aliens his Part, though the Entry of the eldest Son may give Seisin to his Brother, yet it cannot to the Stranger; for he is in as Tenant in Common by a different Title, and must implead, and be impleaded by a several *Præcipe*; and it is a general Rule that where there shall be several Actions, there must be several Entries.

It is but reasonable that the Sons partaking alike of the Advantages of the Inheritance should be equally subject to the Burthens attendant on it: And therefore if a Man seised in Fee of Lands in Gavelkind has Issue three Sons, and by Obligation binds himself and his Heirs, and dies, an Action of Debt is maintainable against all the Sons. *Co. Litt.* 376. *b.* 386. *b.* *Lamb. Peramb.* $\frac{608}{345}$. *Cro. Jac.* 218. And the Plaintiff in such joint Action shall declare on the Custom.* 11 *H.* 7. 12.

* See the Form of the Declaration, *N. Bendl.* 146. *Raft. Ent.* 208. 1 *Brownl. Decl.* 111.

But



But then the Question will be, when the Obligee shall be compelled to bring his Action against all the Sons, or when he may sue the Heir at Common Law alone; which may be resolved by the following Distinctions.

If the Obligor dies seised of Land in Gavelkind only, the Writ ought of Necessity to be brought against them all: For all the Parceners make but one Heir.

And it has likewise been adjudged, * that if the Obligor leaves both Lands at Common Law, and Lands in Gavelkind, the Heir at Common Law shall not be charged alone, if the other Sons are seised at the Time of the Writ purchased; for the eldest Son is not chargeable simply as Heir, but because he has Lands by Descent as Heir, and this Reason serves equally to charge the rest; and in such Action not only his Assets at Common Law, but likewise his Purparty in Gavelkind would be liable, which that it should be severally from the rest is unreasonable. And therefore, if he be sued alone in such Case, on the special Matter disclosed by Plea, the Writ shall abate. 11 *Ed. 3. Dette 7. Hob. 25.*

But where there are Assets at Common Law, and likewise in Gavelkind, if the Obligee counts generally against the Sons as

* How the Obligee is to sue if the Obligor dies seised of Lands descended to him both from Father and Mother, see 11 *H. 7. 12. Co. Litt. 37b. 3 Rep. 14. a. Vide post. in App.*

Heirs by the Custom, he shall have Execution only of the Lands in Gavelkind; the proper Way therefore to avoid all these Difficulties, is to declare in the same Count against *E.* as Heir by the Common Law; and against the same *E. C.* and *D.* as Heirs in Gavelkind, 11 *Ed. 3. Dette 7.* In the same Manner as the Heir at Common Law and Heir in *Borough English* are sued jointly in *Brownl. Ent. 180.* And this is agreeable to the Law in Case of Vouching the Heirs to Warranty, where there are Assets both at Common Law and in Gavelkind, *Vide post.*

If the eldest Son only has Assets remaining, and the rest have aliened their Parts, then the Obligee may bring his Action against the eldest alone. *Lamb. Peramb. 608. 11 Ed. 3. Dette 7.*

But if pending a Writ against the Eldest Son only, Lands in Gavelkind descend to him and the others, the Writ shall abate. 11 *Ed. 3. Dette 7. Per Sbard.*

If a Man having Lands in Gavelkind binds himself and his Heirs in an Obligation, and dies, leaving three Sons, and one of them aliens his Part, and the Writ be brought against them all, the Whole shall be levied upon the others who have Assets. As in Debt against two Female Parceners on the Bond of their Ancestor, if one of them has aliened before Action brought, the Plaintiff shall have Execution for his whole Demand against the Purparty of the other. 11 *Ed. 3. Dette 7.*

Sir

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Debt against
3 Heirs in
Gavelkind,
who are out-
lawed, and 2
purchase Par-
don, the Parol
shall not de-
mur for the
Nonage of
the other.

Sir Anthony Aucher being seised in Fee of Gavelkind Lands, binds himself and his Heirs in an Obligation, and has Issue three Sons and dies; the Sons enter, the eldest of them has Issue a Daughter, and dies; and Debt is brought against the two surviving Brothers and the Issue of the Eldest (who was but seven Years old) as Heirs, and the Process continued till the Uncles were outlawed, and the Niece waived: The Uncles purchase a Pardon for themselves, and on a *Scire Facias* to the Plaintiff *ad sequendum*, he declared against the Uncles *simul cum* the Niece; the two Defendants pleaded the Nonage of the Niece, and prayed Judgment whether they ought to answer during her Nonage: But the Court held, that the Parol ought not to demur, for that the Infant is out of Court, and by the Waivure the Original is determined against her; nor is the Outlawry void, but only voidable by Error. *Hawtrey and Aucher, Dyer 239. N. Bendl. 146. 1 Amd. 10. Moor 74. Rast. Ent. 208, 209.*

By this Case it appears that a Parcener by Representation shall be charged with the Bond-Debt of the Ancestor, as well as the others, though *Moor* in his Report makes a *Quere* of it.

Of extending the Lands of the Heirs in Gavelkind on the Judgment or Statute of the Ancestor.

Having shewn in what Manner the Heirs in Gavelkind shall be charged by the Obligation of their Ancestor, let us suppose the Lands to descend to all the Sons charged with a Judgment suffered in Debt, &c. or a Statute acknowledged by their Ancestor, and them to make Partition; in this Case, if the

Part

Part of one of them alone be extended for the whole Debt, he may compel his Copar-teners to contribute, as they are all *Æquali jure*: Chap. VI. V. Stat. 16. & 17 Car. 2. c. 5.

As if a Man be seised of two Acres of Land, one of the Nature of *Borough-English*, and binds himself in a Statute of Recognizance, or Judgment be given against him in Debt, and he dies, leaving two Sons, if one is charged alone, he shall have Contribution against the other. 3 Rep. 12. b. Sir W. Herbert's Case.

So if a Man be bound in a Recognizance, and has two Daughters and dies, and they make Partition, one shall not be charged alone, but shall have Contribution: And if one be within Age, the other shall have the Benefit of it; for in such Case, though she be charged as Ter-tenant, yet she shall have her Age. 3 Rep. 12. b. 13. a. Sir W. Herbert's Case.

We have hitherto considered all the Sons as Heirs, but even with respect to Gavelkind Lands all the Sons as to some special Purposes shall not be accounted Heirs; as in the Case of a Purchase, a Condition, or to take Advantage of a Warranty; for the Heir to have the Benefit of these must not be Heir to a special Intent only, but the general and perfect Heir, the Heir at Common Law. To what Purposes all the Sons are not Heirs.

If Land in Gavelkind is granted or devised to A. for Life, Remainder to the Heirs, or Right Heirs of J. S. who has Issue four Sons, and dies, and afterwards the Tenant for Life dies; the eldest Son of J. S. shall have the Land, Who shall be Heirs to take Gavelkind Lands by Purchase.

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Land, for he takes by Way of Remainder, and not by Descent, and he only to take by Purchase is the Right Heir by the Common Law. 37 H. 8. Bro. Done, 42. Nofme, 6. Discent, 59. 1 Rep. 101, 103. a. in Shelley's Case. Co. Litt. 10. a. Lamb. Peramb. 221. Hob. 31.

And the same is Law of *Borough English*, Hob. 31.

2 Vern. 732,
733.
Prec. in Chan.
464.

But if a Man has Lands of the Custom of *Borough-English*, and likewise Lands at Common Law, and having two Sons, devises the latter to his Heir according to the Custom of *Borough-English*, the Youngest Son shall take; and the Devise shall not be defeated because he is not Heir at Common Law, his elder Brother being living; since that was probably the Reason of making the Devise, as the Lands would have descended to him, had his Brother been dead. So if a Man having Gavelkind Land devises other Lands to his Heirs in Gavelkind, all his Sons shall take as sufficiently described by this Devise, tho' not Heirs by the Common Law. *Per Cowper Lord Chanc.* in delivering his Opinion in the Case of *Newcomen* and *Barkham*, 14 Feb. 1716.

And if a Man seised in Fee of Lands in Gavelkind makes a Gift in Tail, or Lease for Life to J. S. Remainder to his own Right Heirs, then it seems all his Sons shall take by the Name of Right Heirs; for the Remainder limited to the Right Heirs of the Donor is only a Reversion, he bearing in himself during his Life (in Judgment of Law)

Law) all his Heirs, and therefore the Heir shall have it by Descent. *Co. Litt.* 22. *b.* *Dav.* 31. *a.*

So if a Man seised of Lands in Gavelkind make a Feoffment to the Use of himself and his Wife in Tail, Remainder to his own Right Heirs, this Remainder shall go to the Heirs by the Custom. 26 *H.* 8. 4. *b.* *Bro. Custom*, 1. *Lamb.* 548. For it is the old Use, and the Heirs take by Descent, their Ancestor having a precedent Estate of Freehold, and not by Purchase.

If a Man aliens Lands in Gavelkind on Condition, and dies, the eldest Son only shall enter for the Condition broken, and the Right of Entry does not descend to all the Sons. *Lamb.* ⁶²⁸349. *Noy's Max.* 82. *Dyer* 343. *b.* Who is Heir to take Advantage of a Condition annexed to Gavelkind Lands.

And the same Law is of a Condition annexed to *Borough English* Lands. 3 *Rep.* 21. *Moor* 114. *Dyer* 343. *b.*

For the Heir to take Advantage of a Condition must be the Heir at Common Law, the compleat Heir. 9 *H.* 7. 25.

It seems indeed, that when the eldest Son has entered into the whole for Breach of the Condition, and defeated the Estate of the Grantee, the Younger Sons may enter into their Part, and hold together with their Brother: In like Manner, as if a Man seised of Land on the Part of the Mother makes a Feoffment in Fee on Condition and dies, the Heir on the Part of the Father, who is Heir at

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at Common Law, shall enter for the Condition broken, but the Heir on the Part of the Mother shall enter upon him and enjoy the Land. *Co. Litt. 12. b. Plow. 57. a.*

But we ought to distinguish between a Condition in Gros and a Condition incident to a Reversion; for of the latter the special Heir shall take Advantage, though not of the former. A Man made a Lease of Land, parcel *Borough English*, and parcel at Common Law, by Indenture for twenty one Years; *Provided* that if the Lessor, his Heirs, or Assigns should give a Year's Warning to the Lessee, that he, his Heirs, or Assigns would dwell there, then the Lease to be avoided; the Lessor died leaving two Sons, the eldest assigned over his Part to the Youngest; and the Question was, whether the youngest Son was such a Person as could give Warning, or whether the Condition was not gone by the Severance of the Reversion on the Death of the Father: *Manwood* and *Monson Justices* were of Opinion, that he might give Warning, and that the Law, which severed the Reversion, has severed the Condition also. And so for one Part as Heir in *Borough-English*, and for the other as Assignee of his elder Brother (by the Stat. 32 H. 8. 34.) he shall take Advantage of the Condition.— But if a Man makes a Feoffment in Fee of *Borough English* Lands on Condition and dies, having Issue two Sons, the eldest only shall take Advantage of the Condition, for it is a Condition in Gros; but in this Case there was a Reversion in the Lessor. *Moor 113. Godb. 2. S. C.*

And

And it is likewise laid down in *Co. Litt.* 215. a. * that if a Lease for Years be made of two Acres, one of the Nature of *Borough English*, the other at Common Law, on Condition, and the Lessor dies, leaving Issue two Sons, each of them shall enter for the Condition broken, for by Act of Law a Condition may be apportioned. And the same Thing is agreed in *Dumpr's Case*, 4 *Rep.* 120. b. and in 1 *Roll's Rep.* 331. *Ante* 85, 86.

Manwood in *Dyer* 316. b. puts this Case, When Words A Man seised in Fee of Land in Gavelkind, of Condition has Issue two Sons, and by his last Will in a Will of devises the Land to his eldest Son, on Con- Gavelkind dition that he pay to the Wife of the Devi- Lands shall be construed a for 100*l.* at a certain Day, and he fails of Limitation. Payment, whether the younger Son may enter on a Moiety upon his Brother, by a Limitation implied in the Estate? *Quere:*

But this Doubt is, as *Lord Coke* observes, well resolved by the following Determination :

* It is difficult to reconcile with this, another Passage in the same Book : That if a Man seised of Lands *ex parte matris*, makes a Gift in Tail or Lease for Life, the Heir of the Part of the Mother shall have the Reversion ; and the Rent also, as incident thereunto, shall pass with it ; but the Heir of the Part of the Mother shall not take Advantage of a Condition annexed to the same ; because it is not incident to the Reversion, nor can pass therewith. *Co. Litt.* 12. b. But as this is not warranted by the Case cited as an Authority for it in the Margin of that Book, I have adhered to the other Opinions as more agreeable to common Reason.

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A Copyholder in Fee of Land descensible in *Borough English*, having three Sons and a Daughter, after a Surrender to the Use of his Will, devises the Land to his *eldest* Son, paying to his Daughter and each of his other Sons 40*s.* within two Years after his Death; the eldest Son is admitted, and does not pay the Money; the youngest Son enters on the Land, and his Entry was held lawful; for though the Word *paying* in Case of a Will may make a Condition, yet here the Law construes it a Limitation, of which the youngest Son in *Borough English* may take Advantage; and it is the same as if he had devised the Land to his eldest Son till he made Default in Payment: For if it should have been a Condition, then it would have descended to the Eldest, and it would consequently have been at his Pleasure, whether his Brothers or Sister should be paid or not. *Wellocke and Hammond, 3 Rep. 20, 21. Cro. Eliz. 204. 2 Leon. 114.*

But let us put a Case a little different from the former: A Man having three Sons devises Gavelkind Lands to his *second* Son, paying, or upon Condition to pay, to each of his other Sons 100*l.* and the Devisee fails of Payment, I take it that the youngest Son cannot take Advantage of this by entering into a third Part; but in order to defeat the Devise the Eldest Son ought first to enter upon the Whole, agreeably to the Determination in the Case of *Curtis and Woolverstone, Cro. Jac. 56.* Where a Man having three Sons, and several Daughters, devised Lands descensible in *Borough English* to his *second* Son

Son in Fee, on Condition to pay 20*l.* to each of his Daughters at their Age of twenty-one; the Devisee not paying the Money at the Time, the youngest Son entered in his own Name; but it was held ill, for this shall not be taken as a Limitation, but as a Condition, it differing from the Reason of the Case of *Wellocke* and *Hammond*, where had it been construed a Condition, it had been void and to no Purpose; but it shall be expounded according to the Common Law, where it is not necessary to give it a contrary Exposition.

Concerning Warranties annexed to Gavelkind Lands, it is said generally in several Books, that every Warranty which descends, descends to him that is Heir by the Common Law. *Co. Litt.* 12. a. 376. a. *Litt. Sect.* 603, 718. *Hob.* 31: *Cro. Jac.* 218. 22 *Ed.* 4. 10. b. But for the better understanding this Rule with the proper Restrictions, I will consider the Authorities which treat more distinctly of this Matter, under three Heads; first, whether the younger Sons, Heirs in Gavelkind, may take Advantage of a Warranty annexed to their Estate: 2. Whether they shall be barred or rebutted by the Warranty of their Ancestor. 3. Whether they may be vouched by Reason of such Warranty.

1. If Land warranted comes to a younger Brother by *Borough English* or Gavelkind, he is without Remedy against the Warrantor; for he cannot vouch as Heir alone, except when

1. Whether Younger Sons, Heirs in Gavelkind, can take Advantage of a Warranty.

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when he comes in as a Vouchee for his Possession with the very Heir. *Hob. 25. W. Jones 361.*

2. Whether they shall be barred by a Warranty.

But 2dly, as the Heirs in Gavelkind cannot take Advantage of a Warranty, so on the other Hand they shall not be barred by it. *17 Ed. 3. 61. 44 Ed. 3. 16. b. 22 Ed. 4. 10. Noy's Max. 84.* For Warranty on Land in *Borough English* or Gavelkind binds only the Heir at Common Law. *Dyer 343. b.*

W. Jones 361.

Fitzh. Warranty, 94.

Lit. Sect. 603.

Litt. Sect. 735. " A Warranty cannot go
 " according to the Nature of the Tenements
 " by the Custom, but only according to the
 " Form of the Common Law: For if Tenant in Tail be seised of Tenements in
 " *Borough English*, where the Custom is that
 " all the Tenements within the same Borough ought to descend to the youngest
 " Son, and he discontinues the Tail with
 " Warranty, &c. and has Issue two Sons,
 " and dies seised of other Lands and Tenements in the same Borough in Fee-simple to the Value or more of the Lands
 " entailed, &c. yet the youngest Son shall
 " have a *Formedon* of the Lands entailed,
 " and shall not be barred by the Warranty of his Father, though Assets descended to him in Fee-simple from his
 " said Father according to the Custom;
 " for that the Warranty descends on his
 " elder Brother, who is in full Life, and
 " not on the Youngest: And in the same
 " Manner

“ Manner it is of a * collateral Warranty
 “ made of such Tenements, where the War-
 “ ranty descends on the eldest Son, &c. this
 “ shall not bar the youngest Son, &c.

Sett. 736. “ In the same Manner it is of
 “ Tenements in the County of *Kent* which
 “ are called Gavelkind, which Tenements are
 “ partible among the Brothers, &c. accord-
 “ ing to the Custom; if any such War-
 “ ranty be made by an Ancestor, such War-
 “ ranty shall descend only to the Heir, which
 “ is the Heir at Common Law, that is to
 “ say, to the elder Brother, according to
 “ the Consuance of the Common Law, and
 “ not to all the Heirs, that are Heirs
 “ of such Tenements according to the
 “ Custom.”

Lord Coke's Comment on this Place is this,
 “ Hereupon a Diversity is to be observed
 “ between a Lien Real and a Lien Personal.

* It is a common Mistake, that all collateral War-
 ranties are taken away by the Stat. 4 & 5 Ann. 16.
 whereas that Statute only makes void all Warranties by
 Tenant for Life, and all collateral Warranties made
 by any Ancestor, *not having an Estate of Inheritance in*
Possession: So that if *A.* be Tenant in Tail, Remainder
 to *B.* his next Brother (which is a very common Case,
 arising almost on every Marriage-Settlement) and *A.*
 being in Possession makes a Feoffment, or levies a Fine,
 with Warranty from him and his Heirs, and dies with-
 out Issue; this is a † collateral Warranty, (for *B.*'s
 Title is by Way of Remainder, to which his elder
 Brother is collateral) which shall bar *B.* notwithstand-
 ing the Statute, though no Assets descend. *Et sic de*
familibus.

† *Vide Litt.*
sect. 716.

Of the Nature of Gavelkind

Book I.



“ For the Lien Real, as the Warranty, doth
 “ ever descend to the Heir at the Common
 “ Law, but the Lien Personal doth bind
 “ the special Heirs, as Heirs in Gavelkind,
 “ &c.” And the very same Observation
 is made by the same Judge. *Cro. Jac.*
 218.

But the Warranty may be pleaded in Bar
 of the Purparty of the eldest Son, tho’ not
 of the Younger. 17 *Ed.* 3. 61. *a.* 44 *Ed.* 3.
 16. *b.*

Devise of
 Gavelkind
 Lands to all
 the Sons e-
 qually to be
 divided, they
 shall be in by
 the Devise,
 and not by
 Descent.

Indeed, by the Pleading in *Beare’s Case*,
Goldsb. 88. 1 *Leon*, 112. It seems admit-
 ted, that a Warranty with Affets will bar
 all the Heirs in Gavelkind, but as it is con-
 trary to all the other Authorities, it can-
 not be maintained as Law: But the Case is
 worthy to be cited for the Matter adjudged:
 A *Fornedon* in *Descender* by three Brethren
 of Lands in Gavelkind; the Warranty of
 their Ancestor was pleaded against *them* in
 Bar, and they were at Issue upon Affets de-
 scended to the Demandants: The Jury
 found a special Verdict; that the Father of
 the Demandants was seised of the Lands al-
 leged to be Affets, and by his Will devi-
 sed them to his three Sons, the now De-
 mandants, and to their Heirs equally to be
 divided; and if this should be said to be a
 Descent to them was the Question, because
 the Law would have done as much, and
 therefore they should be Affets: But the
 Court held the contrary, for they shall be
 Jointenants or Tenants in Common, and
 they shall not be in by Descent, and so no Af-
 fets; for if a Man may have more Benefit by
 the

the Devise than by Descent, he shall take by the Devise. The same Law if he devises his Lands to his two Daughters and their Heirs, they shall be Jointenants and not Coparceners; and if a Man devises to his Son and Heir in Tail, he shall not take by the Descent.

Chap. VI.

Cro. Eliz.

431.
Goldf. 141.

3. If a Man enfeoff another of an Acre of Land with Warranty, and has Issue two Sons, and dies seised of another Acre of Ground of the Nature of *Borough English*, and the Feoffee is impleaded, though the Warranty descends on the eldest Son, yet he may vouch them both, the one as Heir to the Warranty, and the other as Heir to the Land; for if he should vouch the eldest Son only, then he should not have the Fruit of his Warranty, viz. a Recovery in Value; and the youngest Son only he cannot vouch, because he is not Heir at the Common Law upon whom the Warranty descends. *Co. Litt.* 376. a.

3. Of vouching Heirs in Gavelkind or Borough English.

1 Ed. 3. 12.
40 Ed. 3. 14.
22 Ed. 4. 10.

* So it is of Heirs in Gavelkind, the eldest may be vouched as Heir to the Warranty, and the other Sons in Respect of the Inheritance descended to them. But the Heir at Common Law may be vouched alone at the Election of the Tenant. *Co. Litt.* 376. b. *Hob.* 25. 2 *Roll. Abr.* 743. pl. 3. *Fitz. Counterplea del Voucher* 80. *Aid* 172. 1 Ed. 3. 12. a. 4 Ed. 3. 55. 43 E. 3. 19. 25 E. 3. 38. 27 H. 6. 1. 22 Ed. 4. 10. a. in Respect of the Possession.

If he has likewise Assets at Common Law; for otherwise they must all be vouched of Necessity, unless the younger Son has



aliened his Purparty before the Day of Voucher. 38 *Ed.* 3. 22. *b.* And the eldest Son cannot be vouched alone where the other Brothers have Part of the same Inheritance. 11 *Ed.* 3. *Dette* 7. *Noy's Max.* 84.

Where Lands at Common Law descend, and likewise in Gavelkind, and there are divers Sons, and the Feoffee would have the Affets of each Kind liable to his Warranty, *A.* the eldest Son must first be vouched by himself as Son and Heir of the Warrantor; and then the same *A.* with his other Brothers, Sons and Coheirs of the same Ancestor, all in one Voucher; for the Tenements at Common Law will not be recovered in Value, unless the Eldest be first vouched alone, and then with the others. 11 *Ed.* 3. *Dette* 7. 4 *Ed.* 3. 55. *b.* and in 33 *Ed.* 3. *Judgment*, 254. is a Voucher in like Manner.

But as Vouching two Men as Heirs to the same Ancestor appears to be against the Common Law, which acknowledges but one Heir Male, it cannot be done without shewing the Custom at the same Time. 16 *H.* 7. 13. *a.* Nor is it sufficient to say, that the Land in Demand is Gavelkind, but it must also be alledged, that they are *seised* of this Gavelkind Land by Descent; for if the eldest Son enters into the Whole claiming it to himself, so that his Entry cannot be said to be the Possession of the other, the Youngest cannot be vouched with the Eldest, because he has not the Possession, in regard of which only he is to be vouched. 43 *Ed.* 3. 19. *a.* 2 *Roll. Abr.* 748. *pl.* 2 & 4.

If the Father enfeoff his Son and Heir, with Warranty from himself and his Heirs, and dies, the Son shall vouch himself, and his younger Brother as Heir in *Borough English*, but then this Cause must be specially shewn. 40 Ed. 3. 14. a. 41 Ed. 3. 25. a. Co. Litt. 390. a. 2 Roll. Abr. 746. pl. 17. Chap. VI.

So if after such a Feoffment the Father die seised of Lands in Gavelkind, the eldest Son may vouch himself and his Brother by the Custom of Gavelkind, shewing this for Cause. 12 H. 7. 3. b. 12 Ed. 3. Voucher 113.

In the Case of *Borough English*, the Son and Heir by the Common Law having nothing by Descent, the whole Loss of the Recovery in Value lies upon the Heirs of the Land, though they be no Heirs to the Warranty. Then put the Case that there is a Warranty paramount, who shall deraign that Warranty, and to whom shall the Recovery in Value go? Some have said that as they are vouched together, so shall they vouch over, and that the Recompence in Value shall enure according to the Loss, and that the Effect must pursue the Cause, as a Recovery in Value on the Part of the Mother shall go to the Heirs on the Part of the Mother, &c. Of deraigning the Warranty paramount.

Some others hold that it is against the Maxim in Law, that they, that are not Heirs to the Warranty, should join in Voucher, or take Benefit of the Warranty which descended not to them; but that the Heir at the Common Law, to whom the Warranty



ranty descended, shall deraign the Warranty and recover in Value, and that this doth stand with the Rule of the Common Law.

Others hold the contrary, and that it should be both against the Rule of Law and against Reason also; for by the Rule of Law the Vouchee shall never sue to have Execution in Value, till Execution be sued against him: But in this Case Execution can never be sued against the Heir at Common Law; therefore he cannot sue to have Execution over in Value. *2dly*, It should be against Reason, that the Heir at Common Law should have *totum Lucrum*, and the special Heirs *totum Damnum*. I find in our Books this Reason yielded, that the special Heir should not be vouched only, because if the special Heirs should be vouched only, they should not deraign the Warranty over, which should be mischievous that they should lose the Benefit of the Warranty; but if the Heir at Common Law were vouched with them, as by Law he ought, all might be saved. *Co. Litt. 376. b.*

Fitz, Gar-
rantie, 94.

And this latter appears to be the Opinion of Lord Coke himself, from the Case of *Game and Sims, Cro. Jac. 218*, where the same Judge says, that if the Heir at Common Law be vouched for Warranty, who vouches the Heirs in Gavelkind because of the Possession, they all shall vouch over, and what is recovered in Value shall go only to the Heirs in Gavelkind: So if two be vouched where one has nothing, and they vouch over, the Recovery in Value goes only to him who had the Interest.

And

And of the same Opinion both as to the Heirs in Gavelkind and *Borough English* was *Holt Ch. Just.* in the Case of *Page* and *Heyward*, *Trin. 3 Ann.*

If two Coparceners in Gavelkind are vouched as one Heir, the Parol shall demur for the Nonage of the Youngest, if he be seised; yet he is vouched for his Possession, and not because of the Descent of the Warranty. 43 *Ed. 3. 19. a. 1 Roll's Abr. 144. pl. 1. 27 H. 6. 1.*

But it is a good Counterplea in such Case, that the youngest Son is seised of no Part of the Land by Descent from the same Ancestor, and therefore that the Demandant ought not to be delayed by Reason of his Nonage. 43 *Ed. 3. 19. a. Bro. Counterplea del Voucher, 11.*

If one Parcener in Gavelkind is vouched, he may pray in Aid of his Coparceners, that they may be equally charged, and have the Benefit of the Warranty Paramount. 11 *H. 4. 23. a.* But where in a *Cui in vita* four Coparceners in Gavelkind were vouched, and three of them made Default after Default, upon which Seisin of the Land was awarded for three Parts, and the fourth entered into the Warranty; it was adjudged that he should not have Aid of the other three; for the Charge is now equal, and the others have lost their Parts, and if he should have Aid of them, he should recover also *pro rata* against them for his Part, and so should not

Book I.



not lose as much as the rest, but only a Fourth Part of the Fourth Part. 19 *Ed.* 2. *Fitzb. Aide*, 172. 1 *Roll's Abr.* 182. *pl.* 14. 185. *pl.* 8.

Warranty in a Fine for the Heirs of three, the Lands being Gavelkind, good.

Three Men levied a Fine with Warranty for the Heirs of them all; the Court doubted whether they should receive it, for that the Warranty should be for the Heirs of one in certain; but because the Land was Gavelkind, and the Conufors Heirs by the Custom, it was admitted. 24 *Ed.* 3. 66. *b.* *Fitzb. Fines*, 113. *Bro. Fines.* 65. *Co. of Fines, Sect.* 3.

Of the Partition of Goods in Kent.

V. Somn. on Gavelk. 95, & *seq.* F. N. B. 122. L. Co Litt. 176. *b.*

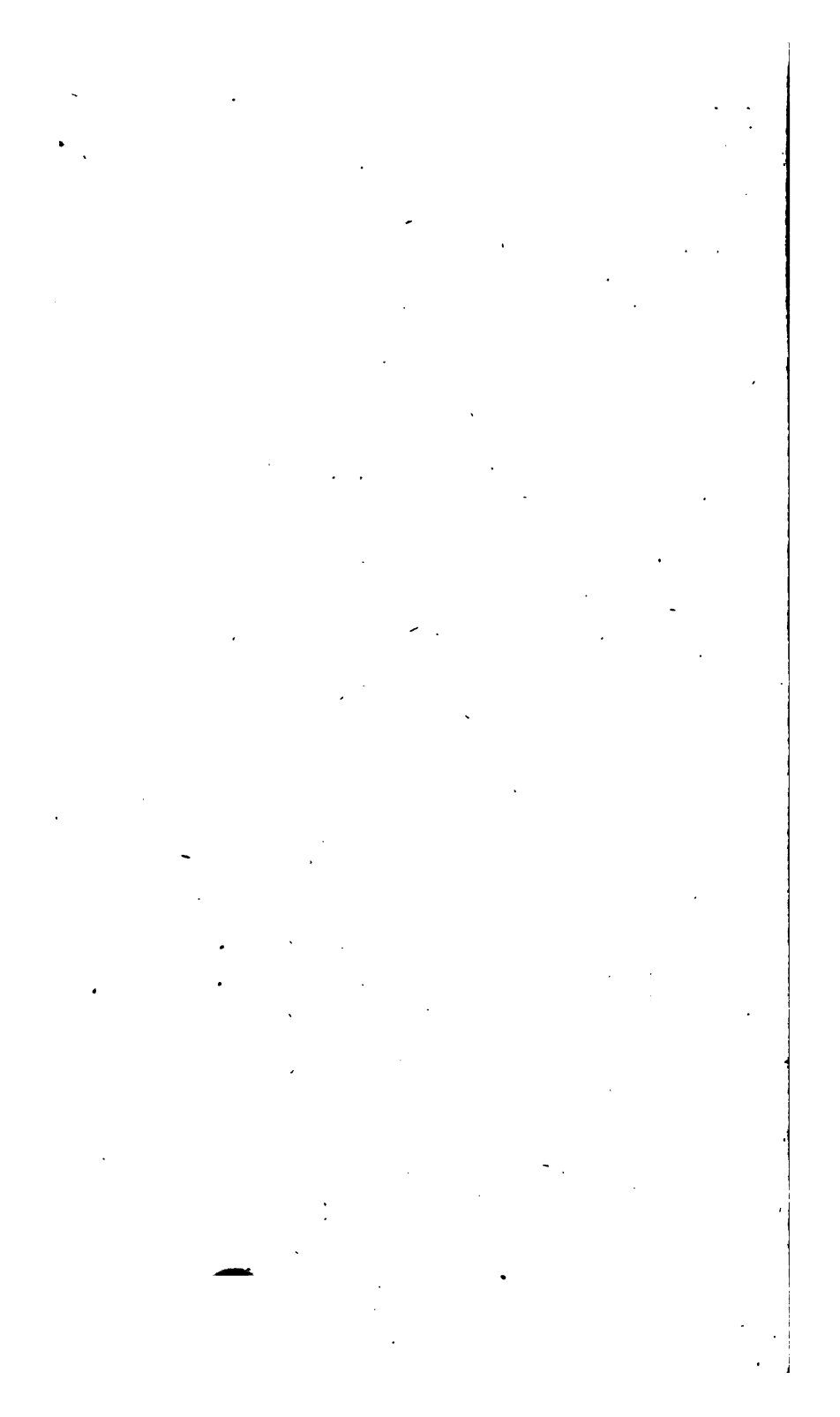
The Statute (as it is called) *de Consuetudinibus Kancie* makes mention of a customary Partition of the personal Estate of the Gavelkind Tenant at his Death, amongst his Wife and Children, much in the same Manner as is the Custom of London: But this was at a Time when, by the better Opinions, the Writ *De Rationabili parte Bonorum* was holden to lie by the general Custom of the Realm. *Glanv. lib.* 7. *c.* 5. *Magna Charta, c.* 18. *Brañ. lib.* 2. *c.* 26. *f.* 60. *b.* *Fleta* 125. 17 *Ed.* 3. 9. *a.* 20 *Ed.* 3. 25. 31 *Ed.* 3. *Responder*, 6. And Lord Coke's Opinion in 2 *Inst.* 33. that this Writ never lay by the Common Law, is founded on an apparent Mistake of the Passage in *Brañon, Neq; uxorem neq; liberos amplius capere de bonis defuncti patris vel viri mobilibus, quam fuerit eis specialiter relictum, &c.* which in the Book itself is affirmed of the Custom of some Cities and Boroughs, in Opposition to the general Law of

of the Land. However it is certain there is no such Custom in the County of *Kent* at this Day; Mr. *Lambard*, who wrote above 150 Years ago, speaks of it only as a Thing which had been formerly; and though Mr. *Somner* mentions an Inclination in some Persons of his Time to have revived this Usage, yet their Endeavours never took Effect: On the contrary, the Men of *Kent* have now beyond Controversy the same Power of disposing of their personal Estates by Will, as the other Subjects of this Kingdom; and as to the Division of Intestate's Estates are equally under the Direction of the Statutes of Distribution: And therefore I shall pass over this Partition of Goods as an obsolete Matter.

Chap. VI.

Peram. 621.

In Pref. to Gavelkind.



B O O K II.

Of the special Customs incident to Gavelkind Lands in Kent.

C H A P. I.

Of Tenancy by the Curtesy.

I NOW come to treat of the *special* or *particular* Customs: which the Courts of Law will not take Notice of barely on alledging the Lands to be of the Nature or Tenure of Gavelkind, but which ought Ante 41, 42. to be pleaded as specially as other Customs; such as, according to the Opinion of the Court in the Case of *Wiseman* and *Cotton*, are not properly incident to, or inseparable from the Nature of Gavelkind, and yet are by immemorial Usage annexed to Land of this Tenure in the County of *Kent* equally with Partition; and indeed at this Day are more extensive than that, these still continuing to take place (as has been before observed) even Ante 77. in Lands disgavelled.

Book II.



How this Custom differs from the Curtesy of *England*.

† Post Itin. Kanc. 39 H. 3. rot. 14. in dorso. rot. 26. in dorso. 9 Ed. 3. 38. a. Somn. 179.

I shall first begin with the Tenancy by the Curtesy of the Wife's Inheritance in Gavelkind.

This was formerly called the Man's † *Free-Bench*; and differs from the Husband's Estate by the Curtesy of *England*, both in Quantity, it being but of a Moiety; and in Quality, as it is obtained on more easy Terms, for Children are not necessary to intitle to it; and indeed enjoyed upon different Conditions, it being liable to be forfeited by the Marriage of the Tenant.

But as I have heard some Doubt made whether there be any Usage in this County variant from the Common Law concerning Tenancy by the Curtesy, I shall not content myself with this short Account of the Peculiarities of this Custom, but think it necessary to cite in a more particular Manner what Authorities I have found on Record or in the Books in Support thereof, that no Room may be left for future Disputes concerning it.

Authorities to shew that the Husband is intitled, after Issue had, only to a Moiety as long as unmarried.

I shall therefore endeavour to shew, 1. That the Husband surviving the Wife is, even *after Issue had* between them, by the Custom of *Kent* intitled to no more than a Moiety of her Gavelkind Lands, and that only while he lives unmarried.

2. That the Custom gives him the same Advantage, tho' he never had Issue by his Wife.

The first is generally accounted the more doubtful Point; but I chuse to begin with it, because it will appear to be put most beyond Controversy by the Evidence on Record as to this Matter; which is very strong, and in order of Time as follows: *Itin.*

Itin. Kanc. 39 H. 3. Rot. 14. in dorso. A Chap. I.
 Cui in vitâ by *John le Mose* and *Juliana* Cui in vitâ.
 his Wife against *John Peltebeam*, for a
 Messuage and Lands in *Malling*: 'Et Jo- Tenantpleads
 ' *bannes Peltebeam* venit, & de medietate that he is sei-
 ' prædictorum tenementorum dicit quod ipse sed but of a
 ' non potest respondere, quia dicit quod non Moiety,
 ' tenet prædictam terram nisi in Custodiâ and of that
 ' cum quodam *Philippo* filio suo, cujus Jus & as his Free-
 ' Hæreditas prædicta terra est, & qui est Bench by the
 ' infra ætatem & in Custodiâ suâ, & de al- Custom of
 ' terâ medietate dicit, quod tenet medietatem *Kent* being
 ' illam tanquam liberum Bancum suum per Le- the Inheri-
 ' gem & Consuetudinem *Kancie*, eò quod præ- tance of his
 ' dictum tenementum fuit Jus & Hæreditas late Wife.
 ' cujusdam *Rosamundæ* quondam uxoris suæ;
 ' & vocat inde ad warrantum prædictum And prays in
 ' *Philippum* filium & hæredem prædictæ *Ro-* Aid of his
 ' *samundæ*, qui est infra ætatem: Ideo lo- Son, his
 ' quela ista, quantum ad medietatem præ- Wife's Heir,
 ' dictam, quam ipse tenet in liberum Bancum &c.
 ' suum sine diē, usq; ad ætatem prædicti *Phi-*
 ' *lippi*; & de aliâ medietate prædicta Consi-
 ' deratum est quod prædictus *Johannes Pel-*
 ' *tebeam* inde sine diē, & *Johannes & Juliana*
 ' in mi'a pro falso clamore.'

Itin. Kanc. 55 H. 3. Rot. 7. 'Assisa ve- Assise;
 ' nit recognitura si *Simeon de Haliberg* & Tenantsplead
 ' *Beatrix* Uxor ejus, &c. injuste disseisive- that the Plain-
 ' runt *Willum* filium *Johannis de Hersing* tiff was inti-
 ' de libero tenemento, &c. Et *Simeon &* tled but as
 ' *Beatrix* uxor ejus dicunt, quod prædictus Tenant by the
 ' *Willus* injuste tulit Assisam illam contra Curtesy, and
 ' eos, quia dicunt quod prædictum tene- that he for-
 ' mentum, quod prædictus *Willus* posuit feited his E-
 ' in visu suo, fuit jus & hæreditas cujusdam state by mar-
 ' *Christiane* kind, &c.

Book H.



' *Christiane* quondam uxoris suæ, & sordis
 ' prædictæ *Beatricis*, cujus hæres ipsa
 ' ita quod idem *Willus* vivente prædicta
 ' *Christiana* uxore suâ tenuit prædictum te-
 ' nementum in manu suâ, & postea mor-
 ' tuâ eâdem *Christiana* tenuit idem *Willus*
 ' prædictum tenementum † *per legem An-*
 ' *gliæ, sicut ei licuit, quamdiu se tenuit sine*
 ' *uxore sibi desponsata*; & quia idem *Willus*
 ' postea desponsavit quendam uxorem, idem
 ' *Simeon & Beatrix*, eò quòd proles suscepta
 ' de prædictis *Will'o & Christiana* obiit, posu-
 ' erunt se in prædicto tenemento nomine ip-
 ' sius *Beatricis* propinquioris hæredis præ-
 ' dictæ *Christiane*, sicut eis licuit *secundum Le-*

† The Reader may observe, that several of these
 Records take no Notice that the Quantity of the Hus-
 band's Estate by the Custom is different from that
 by the Curtesy of *England*; but it will occur at
 the same Time that the Question in them was not
 what Part the Tenant was intitled to at the Death of
 his Wife, but only Whether he had by a subsequent
 Act forfeited that Estate, whatsoever it was; and the
 Conclusion of them all is that the Tenant had lost his
 Estate, so that it became entirely immaterial what he
 had before. The Reasons of the Husband's not de-
 manding a *Moiety* only of so many Acres, &c. are, 1.
 Because he might remain in the whole *quousq; partitum*
fuit, &c. as appears by the Record of *Itin. Kanc. 21*
Ed. 1. rot. 1. where on this Account, though his Claim
 is but of a *Moiety*, he has Judgment for the whole.
 2. If the Action was brought after Partition made,
 then he no longer remained Tenant of an undivided
Moiety, but of Course counted for the whole of so
 many Acres, as were allotted to him on the Parti-
 tion; as we see in *Itin. Kanc. 6 Ed. 2. rot. 17.* The
 rest of the Records put it out of all Doubt that he is
 but entitled to a *Moiety*.

gem

Legem & Consuetudinem Tenementorum in Gavelkind. Chap. I.

Et prædictus *Will'us* bene concedit quod ipse nihil clamat nisi nomine prædictæ *Christiane*, sed dicit quod prædictum tenementum non est talis naturæ, quod illi, qui illud tenent per legem *Angliæ*, illud amittere debeant, licet ad secundas nuptias convolaverunt; & de hoc se ponit super Assisam. Postea prædictus *Will'us* non est prosecutus breve suum, &c.

Plaintiff replies, that the Lands are not of such Nature.

Nonsuit.

In eod' *Itin. rot. 51.* Assisa venit recognitura si *Mabilia* filia *Dyonisæ* & alii injuste disseisiverunt *Johannem le Gule* de libero tenemento suo, &c.

Assise,

Et *Mabilia* & alii venerunt, & *Mabilia* respondet pro se & omnibus aliis, & dicit, quod prædictum Messuagium & terræ fuerunt perquisitum prædictæ *Dyonisæ* matris suæ, quæ nupta fuit prædicto *Johanni le Gule*, ita quod post mortem ejusdem *Dyonisæ* prædictus *Johannes* tenuit prædicta tenementa per legem *Gavelkynd*, & quia fecit vastum & estrapamentum de eodem tenemento postquam aliam uxorem duxerat, prædicta *Mabilia* intravit in prædicta tenementa per capitalem Dominum ejusdem feodi, ut in hæreditatem suam, prout ei bene licuit secundum Legem & Consuetudinem *Gavelkyndorum*.

Tenant pleads, that the Plaintiff being seised as Tenant by the Curtesy married again and committed Waste, and that she entered, &c. by the Custom of *Gavelkind*.

Et prædictus *Johannes* dicit quod nihil habuit in prædictis tenementis nomine prædictæ *Dyonisæ*, quia dicit quod tenementa fuerunt perquisitum suum, &c.

Plaintiff replies, that the Lands are of his own Purchase.

Juratores dicunt super sacramentum suum quod prædictum tenementum fuit jus præ-

Verdict and Judgment for the Tenant.

Book II.



dictæ Dyonisæ uxoris prædicti Johannis,
 qui tenementum illud postea tenuit per Legem
 Angliæ, & quia idem Johannes secundo
 maritavit, & fecit vastum & venditionem de
 prædictis tenementis, prædicta Mabilia in-
 travit in prædicta tenementa, secundum quod
 ei licuit per Legem Kanciz. Ideo confi-
 deratum est quod prædicta Mabilia & alii
 eant inde sine die, & prædictus Johannes
 nihil capiat per Affisam, sed sit in mi'a,
 &c.

Affise,

Itin. Kanc. 7 Ed. 1. Rot. 3. in dorso, Rex
 Roll. In an Affise brought by William and
 Thomas Sons of Hugh de Hormesdesboll against
 Stephen Arnet, for a Messuage and two Acres
 of Meadow in Westbyr, the Tenant pleads,
 that the Premises in Question fuerunt Jus
 & Hæreditas Julianæ quondam uxoris suæ,
 &c. quæ inde obiit seifita, de quâ ipse su-
 scitavit prolem, unde dicit quod nihil cla-
 mat in prædictis tenementis nisi per legem
 Angliæ ratione prædictæ prolis ex eâ susci-
 tata, &c.

Tenant
 pleads, that
 he is in by the
 Curtesy of
 England.

Plaintiffs re-
 ply the Cu-
 stom of Ga-
 velkind, to
 forfeit by se-
 cond Marri-
 age, &c.

Et iidem Willus & Thomas dicunt, quod
 prædictus Stephanus nihil clamare potest in
 tenementis prædictis per legem Angliæ,
 quia dicunt quod prædictum tenementum
 tenetur in Gavilekynde, & Consuetudo de
 Gavelekynde talis est quod cum aliquis despon-
 savit mulierem habentem hæreditatem, & ex
 eâ suscitavit prolem, & post mortem illius mu-
 lieris aliam duxerit in uxorem, hæredes primæ
 mulieris habent actionem petendi hæreditatem
 primæ uxoris; & dicunt quod prædictus
 Stephanus post mortem prædictæ Julianæ
 primæ uxoris suæ, matris prædictorum
 Willi

‘ *Will’i & Thomæ*, duxit quandam uxorem
 ‘ quæ adhuc superstes est. Postea venit Ju-
 ‘ *rata & dicit quòd talis est Consuetudo Patriæ*
 ‘ qualis prædicti *Will’us & Thomas* dicunt,
 ‘ & quòd prædictus *Stephanus* quandam aliam
 ‘ in uxorem duxit, quæ adhuc superstes est.
 ‘ Ideo consideratum est quòd prædictus
 ‘ *Will’us & Thomas* recuperent seisinam suam,
 ‘ &c.’

Chap. I.

Verdict finds
the Custom,
&c.

Judgment for
the Plaintiffs.

Itin. Kanc. 21 Ed. 1. Berewicke Roll, Rot. 1. Affise,
in dorso. In an Affise brought by *William*
Stoc against *Robert* Son of *Robert de Thirling*,
 for Lands in *Sturrey* and *Westbere*, the Te-
 nant pleads in Bar, that he is Son and
 Heir of *Maud of Westbere*, who died seised
 of the Premises in Question. The Plaintiff
 in his Replication admits that *Maud* died
 seised, ‘ sed dicit quòd ipse desponsavit præ-
 ‘ dictam *Matildam*, de quâ suscitavit prolem,
 ‘ ratione cujus prolis ipse habere debet me-
 ‘ dietatem totius tenementi de quo ipsa *Ma-*
 ‘ *tilda* obiit seifita, per Consuetudinem *Kan-*
 ‘ *ciæ*, eò quod tenementa prædicta tenentur
 ‘ in Gavilykende, & in eodem morari debet
 ‘ quousq; partitum fuerit inter ipsum & hære-
 ‘ dem.’

Plaintiff inti-
tles himself to
a Moiety as
Tenant by
the Curtesy
according to
the Custom of
Gavelkind.

The Tenant rejoins, and confesses that the
 Plaintiff had Issue by *Maud*, ‘ sed dicit quòd
 ‘ *Will’us* eâ ratione de tenementis quæ tenen-
 ‘ tur in Gavylekende secundum Consuetudi-
 ‘ nem *Kanciæ* nihil habere debet; & hoc para-
 ‘ tus est verificare.’

‘ Et quia † *TOTUS COMITATUS* The whole
 ‘ recordatur quòd quilibet vir qui desponsaverit County find
 ‘ mulierem, quæ tenementa habet de hereditate the Custom.

L 3

† For the
Meaning of

this Expression, see *post. lib. 2. c. 7.*

Book II.



‘*suā, & de ipsā prolem suscitaverit, post mortem ejusdem uxoris habere debet medietatem totius hereditatis ejusdem tenendam ad terminum vitæ suæ, nisi prius aliam duxerit uxorem, Idèò consideratum est quòd prædictus Will’us recuperet seisinam suam de prædictis tenementis.*’

Assise,

Tenant pleads Non-tenure, for that he had been Tenant by the Curtesy, but had forfeited by the Custom of Gavelkind, by marrying again,

In eod. Itin. Rot. 41. An Assise brought against Salomon Son of Hugh de Astesfeld, who pleads Non-tenure in the following special Manner: ‘*Venit & dicit, quòd prædictum tenementum fuit de Gavelecund, & quòd quædam Cristiana quondam uxor sua obiit inde seiscita ut de feodo, post cujus mortem prædictus Salomon tenuit tenementa prædicta per legem Angliæ quousque secundam uxorem desponsaverat, per quod incontinenti per Consuetudinem de Gavelecund forisfecit ipse tenementa prædicta; & liberum tenementum eorundem tenementorum fuit quarundam Jobannæ & Margeriæ filiarum ipsorum Salomon & prædictæ Cristiane, et quòd Cristiane prædictæ Jobanna & Margeria hæredes sunt; inde dicit quòd ipse non tenet.*’ And Issue is taken on the Non-tenure.

The Jury find accordingly.

‘*Juratores dicunt super sacramentum suum quòd prædicta Cristiana obiit seiscita de tenementis prædictis ut de feodo, post cujus mortem prædictus Salomon tenuit tenementa prædicta per Legem Angliæ quousque secundam uxorem suam desponsaverat, per quod incontinenti postea liberum tenementum prædictum tenementum fuit prædictæ Jobannæ & Margeriæ, ut hæredum prædictæ*

‘ *dictæ Christianæ*, sicut prædicitur, unde di- Chap. I.
 ‘ cunt quòd prædictus *Salomon* die & anno, 
 ‘ &c. non tenuit, &c.

In eodem Itin. Rot. 70. In an Assise In Assise the
 brought for Lands, Part at Common Jury find that
 Law, and Part Gavelkind, ‘ *Juratores* the Tenant
 ‘ super sacramentum dicunt quòd prædicta by the Cur-
 ‘ tenementa fuerunt jus prædictæ *Alicie* ma- tesy of Gá-
 ‘ tris prædicti *Jobannis*, & quondam uxoris velkind shall
 ‘ prædicti *Will’i*, de quâ idem *Will’us* pro- have but a
 ‘ lem suscitavit, ratione cujus prolis idem Moiety by the
 ‘ *Will’us* remansit in eisdem tenementis post Custom.
 ‘ mortem prædictæ *Alicie*, ut in illis quæ
 ‘ tenere debuit per legem *Angliæ*, quousq;
 ‘ prædicti *Jobannes*, &c. ipsum injuste disseisi-
 ‘ verunt; dicunt etiam quòd *quædam pars*
 ‘ *prædictorum tenementorum tenetur inter in Ga-*
 ‘ *vilikend unde prædictus Will’us tantum ba-*
 ‘ *bere debet medietatem secundum Consuetudinem*
 ‘ *Comitatûs istius.*

‘ *Itin. Kanc. 6 Ed. 2. Rot. 17.* Assisa venit Assise.
 ‘ recognitura, si *Will’us* filius *Petri* de *Mer-*
 ‘ *dale*, & alii injustè, &c. disseisiverunt *Petrum*
 ‘ *de Merdale* de libero tenemento suo in *Ben-*
 ‘ *bam* & *Hertlepe*, &c. Unde queritur quod
 ‘ disseisiverunt eum de uno Messuagio, decem
 ‘ acris terræ, & octo solidatis redditûs cum
 ‘ pertinentiis, &c.

‘ Et prædictus *Will’us* filius *Petri* respondet Tenant
 ‘ ut tenens, &c. & dicit quòd prædictus pleads that
 ‘ *Petrus* injustè tulit Assisam istam versûs the Plaintiff
 ‘ cum, &c. quia dicit quòd idem *Petrus* was never
 ‘ *seised, &c.*

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Jury find

that the Plaintiff was seised as of a Moiety of the Inheritance of his late Wife, by the Custom of Gavelkind, to hold while sole.

And being seised, the Tenant at the Age of 15 released, &c.

nunquam fuit in seisinâ de prædictis tenementis cum pertinentiis ut de libero tenemento suo, ita quod potuit disseisiri, & de hoc se ponit super patriam, & prædictus Petrus similiter, Ideo capiatur Assisa;

Juratores dicunt super sacramentum suum quod prædicta tenementa, quæ prædictus Petrus posuit in visu suo, & unde queritur se disseisiri, tenentur in Gavelykynde, & sunt medietas unius Messuagii viginti acrarum terræ, & sexdecim solidatorum redditus cum pertinentiis, quæ aliquo tempore fuerunt in seisinâ prædicti Petri & cujusdam Agnetis quondam uxoris ipsius Petri, ut de Jure & Hæreditate ipsius Agnetis. Qui quidem Petrus procreavit de ipsâ Agnete duos filios, scil. prædictum Will'm filium Petri, & quendam Rogerum post mortem cujus Agnetis medietas eorundem tenementorum secundum Consuetudinem de Gavelykynde remansit & remanere debuit prædicto Petro, tenenda eidem Petro ad terminum vitæ ipsius Petri, scil. quamdiu sine aliâ uxore ducendâ se teneret; & aliâ medietas eorundem tenementorum inter prædictum Will'm filium Petri & Rogerum fratrem ejus æqualiter partita fuit, Et dicunt quod postea, prædicto Will'o filio Petri ætatis quindecim annorum existente, quando idem Will'us fuit plenæ ætatis secundum Consuetudinem de Gavelykynde, scil. post quintum decimum annum completum, per quoddam scriptum confectum apud London concessit & dimisit prædicto Petro omnes terras & tenementa cum pertinentiis, quæ habuit

' buit five habere potuit in villis prædictis
 ' per successionem hæreditariam de prædicta
 ' Agnete matre ipsius Will'i, tenendum eidem
 ' Petro ad terminum vitæ ipsius Petri; præ-
 ' dictis tenementis, unde Assisa ista arrainata
 ' est, in seisinâ prædicti Petri existentibus:
 ' Qui quidem Will'us postea rediens ad præ-
 ' dicta tenementa factum suum prædictum
 ' patriæ notificavit & ratum habuit. Et And that the
 ' dicunt quòd prædictus Petrus postmodum Plaintiff af-
 ' se maritavit & cepit uxorem, & quòd præ- terwards mar-
 ' dictus Rogerus frater postnatus, quamcito ried a second
 ' constabat ei quòd prædictus Petrus mari- Wife, and
 ' tavit se, ut prædictum est, vendicavit re- upon the
 ' fiduum prædictæ medietatis, quam prædictus Claim of Ro-
 ' Petrus tenuit secundùm Consuetudinem præ- ger, one of
 ' dictam, quæ ei accrevit ratione quòd idem the Sons, de-
 ' Petrus tenuit per prædictam Consuetudinem livered to him
 ' medietatem dictæ medietatis, quam idem his Purparty
 ' Petrus tenuit per prædictam Consuetudinem of the said
 ' de Gavelykynde de proparte ipsius Rogeri, Moiety, as
 ' liberavit eidem Rogero: Et quòd prædictus forfeited.
 ' Will'us Querens, sciens quòd prædictus But Wm.
 ' Petrus pater suus ceperat uxorem, sicut made no
 ' prædictum est, nullum clameum apposuit Claim for
 ' versus ipsum Petrum pro parte suâ de hæ- above a Year
 ' reditate habendâ, sed morabatur cum ipso and a Half,
 ' Petro per unum annum & dimidium, post- &c.
 ' quam idem Petrus cepit prædictam uxorem
 ' suam secundam, absq; aliquo impedimento
 ' prædicto Petro inde faciundo; & sic idem
 ' Petrus remansit in seisinâ de prædictis tene-
 ' mentis per totum tempus prædictum paci-
 ' ficè, quousq; prædictus Will'us filius Petri
 ' ipsum Petrum inde eiecit. Ideo Consid-
 ' ratum est quòd prædictus Petrus recuperet
 ' seisinam

Book II.

Judgment for
the Plaintiff,
because the
Tenant had
released, &c.

• Note; The
Words, *fuit
plene etatis*,
seem to be
left out of the
Record; for
they are ne-
cessary to
compleat the
Sense.

seisinam suam de medietate prædictorum
tenementorum, unde queritur se disceissit
scil. de illâ medietate, quæ cecidit in pro-
partem prædicti *Will'i filii Petri*, quando
participatio prædicta facta fuit inter ipsum
Will'um & Rogerum fratrem ejus, ut præ-
dictum est, per visum Recognitorum, &
damna sua, quæ taxantur per eosdem ad
unam marcam; & *Will'us* filius *Petri* in
mîa, &c. Et quoad aliam medietatem eor-
undem tenementorum, quæ remansit præ-
dicto *Petro* post mortem prædictæ *Agnæ*,
tenenda eidem *Petro* secundum Consuetudi-
nem de Gavelykynde in forma prædictâ, ut
prædictum est, Dies datus est eis de audi-
endo judicio suo hîc die Martis, &c. Postea
ad illum diem venit prædictus *Petrus*, &
alii non venerunt; & quia per Assisam præ-
dictam compertum est, quod prædictus
Will'us * secundum Consuetudinem de Ga-
velykynde, tempore quo concessit & dis-
misit prædicto *Petro* prædictam medietatem,
quæ ei remansit, &c. & factum suum cum
patriâ istâ ratum habuit, moram faciens;
cum prædicto *Petro*, ut prædictum est; &
quod idem *Petrus* seisinam suam inde con-
tinuavit, quousq; prædictus *Will'us* postea
per longum tempus ipsum *Petrum* inde con-
tra factum suum ejecit, Consideratum est
quod prædictus *Petrus* recuperet inde sei-
sinam suam per visum Recognitorum, &
damna sua, quæ taxantur per eosdem ad
unam marcam; & *Will'us* in mîa; Et simi-
liter prædictus *Petrus* in mîa pro falso cla-
more versus alios in brevi, &c.

There

Of Tenancy by the Curtesy.

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Chap. I.

There is a Report of this last Case, among others of the same *Eyre*, given to *Lincolns Inn Library*, by *Hale Ch. Just.*

And it appears further by *John Scerre's Case*, to be found *inter Plac. Ass. in Com. Kanc. 3 Ed. 2.* And *Alexander de Greenheth's Case*, *Ass. in eod. Com. 15 Ed. 2.* & *Robert le Pykoc's Case*, *Ass. in eod. Com. 17 Ed. 2.* & *19 Ed. 2.* & *William de Adehullegate's Case*, *Ass. in eod. Com. 19 Ed. 2.* That Tenant by the Curtesy of Gavelkind Lands is intitled but to a Moiety.

9 Ed. 3. 38. a. A *Præcipe* brought against a Man, who pleads that the Tenements are of the Nature of Gavelkind, and that he holds them as *Free Bench* in the Name of Dower, as a Moiety of the Tenements that were his Wife's, now of the Inheritance of *John* Son and Heir of his Wife, and prays Aid of him, and says he is under Age, &c. and thereupon the Parol demurred.

Mich. 13 Ric. 2. C. B. Rot. 645. Kanc. Trespass.
In an Action of Trespass brought by *Richard Bak* and *William Holy* against *Tho. Claver*, for breaking their Close at *Bakchild* and *Tonge*, &c. and cutting down the Corn, &c.

The Defendant pleads, 'Quod quædam Defendant
' *Godelina Claver*, quæ fuit uxor ipsius pleads the
' *Thomas Claver*, fuit seiscita de uno messua- Custom of
' gio & septem acris terræ cum pertinen- Gavelkind
' tiis in prædicta villâ de *Bakchild* in domi- for the Hus-
' nico suo ut de feodo, quæ tenementa sunt band to have
a Moiety of
the Estate of
his late Wife, while he lives unmarried, and intitles himself by it.

' de

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de tenura de Gavelkynde in Comitatu *Kancie*, & inde obiit seifita, & secundum consuetudinem de tenurâ de Gavelkynd de tenementis, unde mulieres sic seifitæ sunt viri post mortem earundem mulierum debent tenere medietatem tenementorum illorum pro indiviso [* simul cum Hæredibus] earundem mulierum, dum tamen viri prædicti se tenent non maritatos; & dicitur quod prædicta *Godelina* obiit seifita de tenementis prædictis in *Bakchild*, unde locus, in quo ipsi supponunt transgressionem prædictam fieri, est parcella; post [cujus mortem] prædicti *Ricardus Bak* & *Will'us Holy* tenementa prædicta unde, &c. intraverunt, & terram inde seminaverunt, ... *Thomas Claver* ut vir ejusdem *Godeline*, pro eo quod ad ipsum pertinuit habendum medietatem secundum [consuetudinem] prædictam intravit tenementa prædicta, & medietatem bladorum super terram prædictam seminorum messuit, prout ei bene licuit, &c.'

Plaintiffs reply, 'That the Custom is for the Husband to have a Moiety after Issue had, but not otherwise, &c.'

The Plaintiffs reply, 'Quod consuetudo de Gavelkynd talis est, quod si hujusmodi viri & mulieres habeant exitum, inter se, quod [tunc] hujusmodi viri habebunt medietatem terrarum & tenementorum mulierum prædictarum, dum tamen se tenuerint [non] maritatos, & si contingit hujusmodi

* N B. The Roll being much damaged by Wet is obliterated in all the Places between the [] and supplied only by the Sense.



viros & mulieres non habere exitum inter se, [tunc] post mortem mulierum prædictarum non debent habere aliquam partem terrarum & tenementorum mulierum prædictarum, [& dicunt] quòd prædicta *Godelina* obiit sine hærede inter se & prædictum *Thomam Claver* exeunte; & hoc parati sunt verificare, unde petunt iudicium & damna, &c.

‘ Et prædictus *Thomas* dicit, quòd Con- Defendant
suetudo del Gavelkind talis est, quòd sive rejoins, that
huiusmodi [viri & mulieres] habeant exitum, the Custom
sive non, quòd viri post mortem earundem gives the
mulierum debent habere medietatem tenen- Husband a
dam in forma superiùs per ipsum *Thomam* Moiety, whe-
declaratà; absq; hoc quòd aliqua talis con- ther there
suetudo habetur in Gavelkynde, prout præ- were Issue or
dictus *Ricardus Bak* & *Will’us Holy* superiùs no, and tra-
allegaverunt; & de hoc se ponit super pa- verses the
triam, &c. & prædictus *Ricardus Bak* & Custom al-
Plaintiffs.
‘ *Will’us Holy* similiter. Ideo, &c. præcep- Issue thereon.
tum est vicecomiti quòd venire, &c. Ad
quem diem venerunt partes prædictæ, &
‘ vicecomes non misit breve. Ideo sicut prius,
‘ &c. ad recognoscendum, &c.’ But there
is no Verdict entred.

And lastly, in an Ejectment between *Wood* on the Demise of *Walsh* and *Baker* against *Jefferies*, tried at the Summer Assises for *Kent* in 1739, before the *Lord Ch. Just. Lee*, it was found to be the Custom of *Kent*, that the Husband, who has Issue by his Wife, shall be Tenant by the Curtesy of a Moiety only of her Gavelkind Lands. And accordingly
Baker,



Baker, the Tenant by the Curtesy, had a Verdict for a Part only. Indeed the Premises in Question being of small Value, the Matter was not greatly contested; the Proof of the Custom was by two Attornies of Note, who gave Evidence of the general Reputation of the County: And nothing was attempted to be proved to the contrary.

This Series of Precedents stands contradicted by no Case whatsoever, that I have been able to find, except a short *Anonymous* Note in *Style's Practical Register* 314, 322, where it is said to have been holden in *B. R. Mich. 22 Car.* that by the Custom of *Kent*, if a Man has Issue by his Wife, then he shall be Tenant by the Curtesy of all the Gavelkind Lands his Wife was seised of, and though he marry again he shall not forfeit his Estate. Were this Book of greater Authority than it is, (being but of little, except as to Matters of Practice) and the Case taken to be truly reported, it could not counterbalance the Weight of the others to the contrary. But I had the Curiosity to search the Rolls of that Term, and could find no Case entered on Record as of that Time, in which this Matter could come judicially before the Court.

Authoritiesto
shew that the
Husband is
intitled to a
Moiety as
long as he
lives unmar-
ried, tho' no
Issue had.

I shall proceed to shew in the next Place, that the Custom of *Kent*, tho' less indulgent than the Curtesy of *England* to such Husbands as have Issue by their Wives, is more favourable than the Common-Law to those that have none, giving them an equal Advantage

antage with the others, viz. *A Moiety as long as they live unmarried.* And notwithstanding this be made a Doubt in the Record last cited of *Mich. 13 Rich. 2.* yet that Case is in some Measure an Authority for the Custom; for the Defendant, who claimed to be Tenant of a Moiety, though no Issue had, having taken Possession of the Premises, the not bringing on the Cause to Trial was a Kind of tacit Acquiescence in his Right. And though some of the foregoing Records, which say, that *ratione Proles suscitata, &c. tenuit*, seem to make that a previous Qualification, yet they are properly explained and answered by the following Authorities.

First the *Customal* itself: "If a Man take a Wife that has Inheritance of Gavelkind, and the Wife dies before him, let the Husband have the Moiety of those Lands and Tenements, whereof she died seised, so long as he holds himself a Widower, without doing any Estrepement, Waste or Exile, *whether there were Issue between them, or not*: And if he takes another Wife, let him lose all."

In a Writ of Dower brought for a Moiety, in *Itin. Kanc. 25 H. 3.* (to be found in the *Appendix to Somner on Gavelk. 179.*) by *Burga* late Wife of *Peter de Bendings* against the Prior of the Holy Trinity in *Canterbury*, the Demandant *dicit, quod Manerium est Gavelkinde & partibile, ita quod Robertus de Valoignes Dominus de Sutton, qui duxerat in uxorem Matildam de Welles, cujus Hereditas illud Manerium fuit, post mortem illius Ma-*
tildæ

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tildæ habuit nomine Franci Banci medietatem illius Manerii. And no mention is made of any Issue between them.

Nor is having Issue set out as necessary to entitle the Husband to a Moiety, by the following Record of *Itin. Kanc.* 39 H. 3.

Assize.

Rot. 26. in dorso. ‘ Assisa venit recognitura
‘ si *Andreas Cokin*, custos terræ & hæredis
‘ *Laurence filii Johannis le Bretun*, & alii
‘ injustè & sine iudicio disseisiverunt *Rogerum le Linus* de libero tenemento suo in
‘ suburbio *Cantuar.* Et unde queritur quòd
‘ disseisiverunt eum de medietate undecim
‘ acrarum terræ, &c. Et dicit quòd prædicta terra aliquo tempore fuit jus & hæreditas cujusdam *Godelinæ* quondam uxoris suæ, & ipse *Rogerus post mortem prædictæ Godelinæ fuit in seisinâ de medietate prædictæ terræ ut de libero tenemento suo secundum consuetudinem Kancie* per magnum tempus quousq; prædictus *Andreas* & alii inde ipsum disseisiverunt.

The Plaintiff makes Title as Tenant by the Curtesy of a Moiety by the Custom of Gavelkind.

‘ Et *Andreas* & alii veniunt, & *Andreas* dicit, quòd injuste tulit istam Assisam, quia dicit, quòd prædictus *Rogerus* nullum liberum tenementum potuit clamare in prædictâ terrâ post mortem prædictæ *Godelinæ* uxoris suæ, quia benè cognoscit quòd prædicta terra fuit jus & hæreditas prædictæ *Godelinæ* uxoris suæ, sed dicit, quòd prædictus *Rogerus*, antequam prædictam *Godelinam* desponsasset, concessit ipsi *Godelinæ* quòd si contingeret ipsam decedere ante prædictum *Rogerus*, quòd idem *Rogerus* nihil clamare posset in aliquâ parte prædictorum tenementorum ratione
‘ liberi

liberi Banci sui, sed prædicta tenementa descendere deberent ad hæredes ipsius *Godelina*: Et dicunt quòd hac ratione posuit se in seisinâ quædam *Lauretta* de prædictis tenementis integrè; unde dicunt, quòd si prædictus *Rogerus* disseisitus sit de prædictis tenementis, per ipsos non est disseisitus, immò per prædictam *Laurettam*; & de hoc se ponit super Affisam.

Juratores dicunt, quòd prædictus *Rogerus* per magnum tempus post mortem prædictæ *Godelinæ* fuit in seisinâ de medietate prædictorum tenementorum ut de libero Banco suo; & postea venerunt prædictus *Andreas* & alii; & ipsum de prædicta medietate ejecerunt; unde dicunt quod prædictus *Andreas* & alii prædictum *Rogerm* injuste disseisiverunt. Ideo consideratum est quòd prædictus *Rogerus* recuperet seisinam suam per visum juratorum, & prædictus *Andreas* & alii in mîa.

Verdict and Judgment for the Plaintiff.

Pasc. 16 Ed. 3. Fitzb. Aid, 129. It is pleaded that the Husband held the Land of his Wife by the Usage of Gavelkind, though they never had any Issue between them, and not denied.

Pasc. 19 Ed. 3. Aid, 144. It is pleaded, that by the Usage of Gavelkind in *Kent*, the Husband shall, after the Death of the Wife, hold the Moiety of the Lands of the Inheritance of the Wife, as long as he lives unmarried. And it is mentioned in the Case, that the Wife died without Issue. Note, in the Printing of that Case the Words *le Baron* are misplaced.

M

In

Book II.



In the Case of *Dane v. Johnson & al. Past. 4 Eliz. C. B. Rot. 1022. Kanc. Co. Ent. 602.* It is pleaded, that the Lands are, and from Time to the contrary whereof, &c. have been, of the Nature and Tenure of Gavelkind in the County of *Kent*; "and that the Husband of every Wife dying seised of any Lands or Tenements in the said County, of the said Nature or Tenure, in her Demesne as of Fee-simple or Fee-tail, according to the Custom in the said County, for all the Time aforesaid used and approved, ought and have used to hold and enjoy the *Moiety* of all such Lands and Tenements, of which such Wife died seised, as aforesaid, after the Death of such Wife so dying seised as aforesaid, during the Life of such Husband, if such Husband lived sole and unmarried; and that the said *Nich.* was, and yet is seised of the said *Moiety* with the Appurtenances in his Demesne as of Freehold, as Tenant thereof by the Custom aforesaid." It appears indeed by the Case that the Husband had Issue by his Wife, but that Circumstance is not supposed to be necessary, the Custom being pleaded in general for the Husband of every Wife.

By the Custom of Gavelkind a Man shall be Tenant by the Curtesy without having any Issue. *Co. Litt. 30. a. 111. a.* And the same Thing is agreed in 2 *Sid. 153. Browne and Brookes*, and *Wiseman and Cotton, Raym. 76.*

Tenant

Tenant by the Curtesy of *Kent* of Gavelkind Lands, whether he have Issue or no, until he marry. *Noy's Max.* 27.

By the Custom of *Kent*, if the Wife is seised of *Gavelkind* Lands, and dies without having had Issue by her Husband, he shall be Tenant by the Curtesy of Half the Lands, so long as he lives unmarried; but if he marry again, he shall forfeit his Estate in the Land. *Mich. 22 Car. B. R. Style's Pract. Reg.* 314, 322.

Maritus uxoris decedentis, five liberos ex ea suscepit, five non, terras hujus generis [Gavelkind] accipit ex semisse, quamdiu manet in-nuptus. *Tho. Smith de Rep. Angl.* 109.

Add to these this Verdict in the very Point. *Assise.*

‘*Ass. in Com. Kanc. 16 Ed. 2. Assisa venit recognitura si Will'us de Dagenbam & Jobannis de Estlond injuste, &c. disseisiverunt Will'um le Pede de libero tenemento suo in Stoke in Hoo, & Villis Sanctæ Mariæ, Sanctæ Werburgæ & omnium Sanctorum in Hoo post primam, &c. & unde queritur, quod disseisiverunt eum de medietate triginta quinque acrarum terræ, & quatuor viginti acrarum marisci cum pertinentiis.*

‘*Et Will'us de Dagenbam & Jobannes ve-* Tenants
‘*niunt, & respondent ut tenentes, &c. &* make Title
‘*dicunt quod Assisa inde inter eos fieri non* as Heirs to
‘*debet, quia dicunt quod quædam Margeria* their Mother.
‘*mater ipsorum Will'i & Jobannis, cujus*
‘*hæredes ipsi sunt, aliquando tenuit præ-*
‘*dicta tenementa in visu posita, & inde obiit*
‘*seisita in Dominico suo, &c. secundum*

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‘ Consuetudinem de Gavelykynde post cuius
 ‘ mortem ipsi intraverunt ut hæredes, &c. &
 ‘ prædictus *Willus Pede*, qui fuit vir ipsius
 ‘ *Margeria*, intrusit se in prædictis tenementis,
 ‘ & ipsi hoc permittere noluerunt *pro eo quod*
 ‘ *non fuit exitus inter eos*; unde petunt judi-
 ‘ cium si de hac intrusione Assisam inter eos
 ‘ habere debeat.

Plaintiff re-
 plies, that he
 is entitled to
 a Moiety as
 Tenant by
 the Curtesy
 by the Cust-
 om of Ga-
 velkind, tho’
 no Issue had.

‘ Et *Willus Pede* dicit quòd secundum Con-
 ‘ suetudinem de Gavelykynde quilibet vir habere
 ‘ debet *medietatem* terrarum & tenementorum,
 ‘ quæ fuerunt uxoris suæ de hæreditate suâ, ad
 ‘ tenendum ut liberum tenementum suum
 ‘ dummodo, &c. unde dicit quòd secundum
 ‘ Consuetudinem prædictam ipse intravit in
 ‘ prædicta tenementa, sicut ei bene licuit, &
 ‘ inde fuit seilicet ut de libero tenemento suo,
 ‘ quousq; prædicti *Willus Dagenham* & *Jo-*
 ‘ *hannes* ipsum inde injustè disseisiverunt, &c.
 ‘ Et *Willus* & *Johannes* dicunt quòd non est
 ‘ huiusmodi Consuetudo in *Kanciâ* de tene-
 ‘ mentis de Gavelykynde; & de hoc ponunt
 ‘ se super Assisam, & prædictus *Willus Pede*
 ‘ similiter: Ideo capiatur Assisa.

Verdict finds
 the Custom
 accordingly.

‘ *Juratores* de assensu partium electi di-
 ‘ cunt super sacramentum suum, quòd Con-
 ‘ suetudo de Gavelykynde talis est, quòd qui-
 ‘ libet vir habere debet post mortem uxoris
 ‘ *medietatem* omnium terrarum & tenementor-
 ‘ um, quæ fuerunt ipsius uxoris de hæreditate
 ‘ suâ, sive babeatur exitus, sive non, ad tenen-
 ‘ dum ut liberum tenementum suum, quousque
 ‘ ea forisfecit secundum Consuetudinem prædic-
 ‘ tam. Et quia prædictus *Willus Dagen-*
 ‘ *ham* & *Johannes* satis cognoverunt in Cu-
 ‘ riâ,

Of Tenancy by the Curtesy.

157.

‘ riā, quòd prædictus *Will’us* *Pede* seifitus fuit Chap. I.
 ‘ de tenementis in visu positis, & per eos dis-
 ‘ seifitus, Ideo *Consideratum* est quod recuperet Judgment for
 ‘ inde seifinam suam per visum recognitorum, the Plaintiff.
 ‘ & similiter damna sua, quæ taxantur per
 ‘ Juratores ad trêfdecim solidos & quatuor
 ‘ denarios: Et *Will’us* de *Dagenbam* & *Jo-*
 ‘ *bannes* committuntur Goalæ. Postea fece-
 ‘ runt finem cum Domino Rege pro quadra-
 ‘ ginta denariis, &c.’

And to close all; this Custom, as set down in the *Custumal*, more beneficial in one respect than the Common Law, that the Husband shall hold over, though he never had Issue by his Wife, but less in others, viz. that he shall have but one Half, though he have Issue, and that with a Prohibition of second Marriage, Mr. *Lambard*, who was well acquainted with the State of the County, affirms to have holden Place, and to have been put in Practice in his Time. *Peramb.* § 11. And according to the best Inquiry I have been able to make, the same is the general Reputation of the County at this Day.

There is a Law among those of *Hen. 1.* that The Rise of
 may give some Colour to a Conjecture that this Custom.
 this Custom took its Rise from the common Source, of our Gavelkind Customs the old Common Law: It is the 70th Law of that King; where, after Mention of the Wife's Dower in case she survived her Husband, it is said, *Si Mulier absque liberis moriatur,*

Book II.



* *Parentes ejus cum Marito partem suam dividant.*

Of Waste.

Tenant by the Curtesy by this Custom has no more Power of committing Waste than such Tenant by the Common Law. *Customal of Kent, infra. Itin. Kanc. 55 H. 3. Rot. 51. Ante 139. Lamb. Peramb. 911.*

* Here the Word *Parentes* signifies Kindred or Relations in general, according to the Signification of the French Word *Parent*, and is so used several Times in the same Laws. *Vide 75th Law. H. 1. Et vide Stat. Merton. c. 6. & Litt. Sect. 108.*

C H A P. II.

Of Dower.

THE customary Dower of Lands in Gavelkind was formerly called by the Name of *Free Bench*. *Itin. Kanc.* 39 *H.* 3. *Rot.* 4. and *Rot.* 19. *Itin. Kanc.* 55 *H.* 3. *Rot.* 60. 25 *H.* 3. *App. to Somn.* 178.

The several Qualities whereof different from the Common Law, may be considered under the following Heads,

1. Of what Part the Widow shall be endowed. 2. The Conditions by which her Estate may be defeated. 3. Of what Things she shall be endowed. 4. Of what Estate of her Husband. 5. What Remedies she may have for her Dower. 6. The Manner of demanding this customary Dower. 7. The Manner of Assignment. 8. Of Waivure of her customary Dower.

1. By the Custom of *Kent*, the Wife, after the Death of her Husband shall have for her Dower a *Moiety* of all his Lands and Tenements of the Nature of Gavelkind. *Lamb. Peramb.* 613. *Stat. de Consuet. Kanc. Stat. de Prerog. Regis*, c. 16. 7 *Ed.* 2. *Mayn.* 236. *Itin. Kanc.* 8 *Ed.* 2. *Affise*, 386. 13 *Ed.* 3. *View*, 104. *F. N. B.* 150. *O. Cro. Eliz.* 121, 825. 21 *Ed.* 4. 54. *a. Cro. Car.* 562. *Co. Litt.* 33. *b.* 111. *a. T. Jones*, 6. 2 *Sid.*

1. Of what Part the Widow shall be endowed.

Book II.



2. On what Conditions.

154. 1 *Sid.* 138. *Raym.* 76. *Dav.* 50. *Sonn.* 48, 53, 146. And Numberless Instances in the *Kentish Iters.*

2. But she holds not her Dower absolutely for Life, but only as long as she lives Chaste. 21 *Ed.* 4. 54. a. *Cro. Eliz.* 121. *Hunt* and *Gilburne.* *Ibid.* 825. *Davis* and *Selby.* *The Smith de Rep. Angl.* 109. *Noy's Max.* 28. *T. Jones,* 6. *Lady Cobham* and *Tomlinson.* And unmarried. *Itin. Kanc.* 55 *H.* 3. *Rot.* 57. *Plac. Aff. in Com. Kanc.* 17 *Ed.* 2. *Joan Helles's Case.* *Cro. Eliz.* 121. *Ibid.* 825. *Noy's Max.* 28. *T. Jones* 6. *Co. Litt.* 33. b. 111. a. *Lamb.* 556. 8 *Ed.* 2. *Mayn.* 284. 2 *Ed.* 4. 19. *Moor* 260. If she commit Fornication in her Widowhood, or take a Husband after, she shall lose her Dower. *Stat.* 17 *Ed.* 2. *De Prærog. Reg. c.* 16.

The like Condition in Restraint of a second Marriage was antiently annexed to Dower at the Common Law. *Tenetur tamen Mulier cum assensu Warranti sui nubere, vel dotem amittet.* *Glanv. lib.* 7. c. 12. That is, with the Consent of the Heir, or him in Reversion, whom she may vouch by an implied Warranty. And in the same Sense is the Word *Warrantus* used concerning this Custom of *Kent.* *Plac. Aff.* 52 *H.* 3. *in Com. Kanc. Rot.* 17. *Post.*

Nor is it material by our Custom, whether the taking Husband be before, or after Dower be assigned; for if she marry before, she shall not afterwards be endowed, if after Assignment, the Heir may enter upon her. *Lamb. Peramb.* 560. *Sonn.* 146.

‘ Per Consuetudinem, quæ in diversis locis
 ‘ pro lege observatur, si, cum fuerit ei Dos
 ‘ assignata, vel in Com. *Kanc.* ante assigna-
 ‘ tionem nupserit alicui, statim amittit ter-
 ‘ ram, quam tenet nomine Dotis de Gavel-
 ‘ kind. Et de hac materiâ inveniri poterit
 ‘ de termino *S. M.* anno Regis *H. 2.* post
 ‘ guerram, in Com. *Kanc.* Et si ve *seysinam*
 ‘ habuerit, si ve non, si post mortem viri in-
 ‘ venta fuerit *habens in utero conceptum* ab
 ‘ alio quam viro suo, si nupserit, & licet nupta
 ‘ non sit, *si vir inveniatur, vel puer, vel uterque,*
 ‘ dotem amittet. *Brañ. lib. 4. 313. a.*

The Record above-cited of *M. 2 R. H.* Mr. *Somner* takes to be the Case of *Isabella de Gravenel* mentioned a little higher in *Brañton* p. 308. *b.* where the Custom is thus pleaded, *Quod si ve [Vidua] fuerit in seysinâ, si ve non, si post mortem viri sui alium capiat, amittere debet dotem, si in seysinâ fuerit; si autem extra seysinam, debet amittere clameum.*

But though Chastity, as well as a single Life, be a Condition of her Estate, yet it may be a Question whether the Custom require not a particular Kind of Proof of her Incontinency, before a Forfeiture shall be incurred.

How the In-
 continency
 must be
 proved in or-
 der to a For-
 feiture.

Mr. *Lambard*, *Peramb. 613. 6.* as to this Mat-
 ter says, that the “ Tenant in Dower has
 “ some Conditions waiting on her Estate;
 “ one, that she shall not marry at all; another,
 “ that she take diligent Heed, that she be not
 “ found with Child begotten in Fornication,
 “ &c. so that the Sin of secret Lechery is
 “ but in a sort forbidden, seeing that by the
 “ Custom she forfeits not in the latter Case,
 “ unless the Child be born, and heard to
 “ cry,

Book II.



“cry, and that of the Country People assembled by Hue and Cry.”

And he is supported in his Opinion by the *Consuetudines Kancie*: Ele eit le Moytie de celes Terres & Tenements a tener tant come ele se tient * Veuve, ou de enfanter soit ataint per le ancien Usage, ceo est ascavoir que quaut ele enfaunt, e le enfaunt soit oycrier, e que le Hu e le Cry soit leve, e le Pais ensemble, e eyent viewe de la Enfaunt e de la Mere, adonks perde son Dower entierment, e autrement nyent, tant come ele se tient Veuve.

Assise.

And this is further verified by *Trin. 17 Ed. 3. coram Rege Rot. 32 Kanc.* † Where in an Assise brought by *Roberge*, late Wife of *John at Combe*, against *Thomas* Son of the said *John*, for a Rent of 15s. and other Tenements in *Woodnesberge*, *Folkestone*, and *Esse* near *Sandwich*, the Tenant pleads that the Rent, &c. is Gavelkind, and assigned by him

Bar, that the Premises were the Dower of the Plaintiff, and by the Custom of Gavelkind forfeited by her having a Child.

to the Plaintiff as her Dower, ‘Et Quod talis est usus de Gavelkynde, quod si Vidua post mortem maritorum suorum se maritarint, vel aliquem puerum in *¶ Seneucia* peperint, & puer ille visus fuit, aut cognitus,

* Or as the *Customal* printed by *Tottel* has it, *Veuve ou desenfantee, de enfant soit atteint per aucientz Usages, cestascavoir, &c.*

† Note, The same Record occurs *Int. Plac. Ass. Kanc. 10 Ed. 3.* and was removed into *B. R.* by *Cartiorari* in order to Execution.

¶ *Seneucia* in this Record signifies Widowhood. *Co. Litt. 33. b. in Marg.*

‘vel



‘vel vagiens sive clamans audiatur, statim
 ‘Viduæ illæ secundum usum prædictum
 ‘dotem suam amittent & forisfacient: & dicit
 ‘quod prædicta *Robergia*, postquam ipsa do-
 ‘tata fuit de redditu prædicto & prædictis
 ‘tenementis, unde, &c. peperit quandam fi-
 ‘liam *Johannam* nomine in Seneuciâ apud
 ‘*Reculore*, generatam per quendam *Simonem*
 ‘*Petitz*, quæ quidem filia visa fuit ibidem &
 ‘cognita, per quod prædicta *Robergia* reddi-
 ‘tum prædictum, &c. secundum usum prædic-
 ‘tum forisfecit; unde petit Judicium, &c.’

The Plaintiff, ‘Non dedicit quin ipsa pepe-
 ‘rit filiam in Seneuciâ, sed dicit quod usus de
 ‘Gavelkynde non est talis, qualis prædictus
 ‘*Thomas* superius allegavit; quia dicit quod
 ‘usus Gavelkyndensis talis est, quod Viduæ
 ‘dotatæ, post mortem virorum suorum pro-
 ‘lem *peperentes* in Seneuciâ, dotem suam amit-
 ‘tere non debent, nisi proles illa inveniatur
 ‘vagiens sive clamans infra quatuor muros
 ‘tenementorum illorum, de quibus viduæ sic
 ‘fuerunt dotatæ, & quod ipse, cui tenementa
 ‘illa post mortem hujusmodi viduarum re-
 ‘verti debent, recenter post nascentiam illius
 ‘prolis Hutesium & Clamorem super pro-
 ‘lem illam levaverit; & hoc parata est veri-
 ‘ficare per Assisam, &c.

‘Et prædictus *Thomas* dicit, quod usus
 ‘de Gavelkynde est talis, quod in *quocunque*
 ‘loco *Comitatûs prædicti* hujusmodi Viduæ pe-
 ‘perint in Seneuciâ, & proles illa per quem-
 ‘cunque visa vel cognita, vel vagiens sive
 ‘clamans audiatur, & clamor & hutesium
 ‘levantur, quod Viduæ illæ secundum usum
 ‘prædictum

Reply, that
 by the Cus-
 tom the Dow-
 er is not for-
 feited, unless
 the Child be
 found at its
 Birth by Hue
 and Cry with-
 in the House
 of which the
 Woman is en-
 dowed.

The Tenant
 rejoins, that
 wheresoever
 within the
 County the
 Child is
 found by Hue
 and Cry, the
 Dower is for-
 feited.

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The Jury find
the Custom
accordingly.

But that the
Tenant did
not raise the
Hue and Cry.

Judgment for
the Plaintiff.

‘ prædictum dotem suam amittere debent, &
‘ forisfient: & hoc petit quod inquiretur per
‘ Assisam, & prædicta *Robergia* similiter
‘ Ideò capiatur Assisa.

‘ Juratores dicunt, &c. quòd *talis est usus*
‘ *de tenementis, quæ tenentur de Gavelkind in*
‘ *Comitatu isto, viz. quòd si Viduæ post mortem*
‘ *virorum suorum se maritaverint, vel filium*
‘ *vel filiam in Seneuciâ peperint, dotem suam*
‘ *amittent & forisfacient, in quocunque loco infra*
‘ *Comitatum istum proles illa fuerit inventa vo-*
‘ *gens sive clamans; ita tamen quòd ille, cu-*
‘ *hujusmodi tenementa sic dotata reverti debent,*
‘ *in propriâ personâ suâ, vel per ejus Custodem,*
‘ *sive amicum, si ipse fuerit infra ætatem, re-*
‘ *center post nascentiam illius prolis, hoc est dum*
‘ *proles illa fuerit sanguinolenta, venerit, &*
‘ *super prolem illam Clamorem & Hutesum le-*
‘ *vaverit: & petunt discretionem Justiciario-*
‘ *rum, &c. Juratores quæsit, ex quo non*
‘ *est deductum per prædictam Robergiam quia*
‘ *ipsa peperit filiam in Seneuciâ, si prædictus*
‘ *Thomas in propriâ personâ suâ, vel per ejus*
‘ *Custodem, sive per aliquem amicum suum,*
‘ *recenter, postquam prædicta Robergia sic*
‘ *peperisset, levavit Clamorem & Hutesum,*
‘ *super filiam prædictæ Robergiæ, necne, di-*
‘ *cunt, quòd non. Ideo Consideratum est quòd*
‘ *prædicta Robergia recuperet seisinam suam,*
‘ &c.’

And in *Co. Litt. 33. b.* it is said, that by
the Custom of Gavelkind the Wife shall be
endowed of a Moiety, so long as she keeps
herself sole, and *without Child.*

But

But contrary Authorities are not wanting to shew that the Condition is still more strong; and that not only Child-bearing, a casual Consequence of Fornication, and the Detection of it in this publick Manner, but the Commission of the Act itself is a Forfeiture of her Estate; and so it was found by Verdict *Pasch. 4 Ed. 1. C. B. Rot. 21. Kanc.* and not *Rot. 2.* as is in *1 Roll's Abr. 558.* Where in Bar of a Writ of Dower brought for a Moiety of Lands in *Kent* by *Margery* the Widôw of *John Godefrey*, the Tenant pleads that it is the Custom of Gavelkind, *Quod Vidua amittet dotem, si fornicata vel maritata fuerit*, and that the Demandant had after the Death of her Husband a Son named *William* by one *William de Emesby*. The Demandant confesses the Custom, but replies, 'quod nunquam fuit convicta secundum Legem de Gavelkind; Dicit enim, quod ipse inquisivisse debuit per insidias, quando ipsa fuit in parturiendo, & tunc debuisset ipsam cum puero suo cepisse cum Clamore & Hutesio, &c.' The Tenant rejoins, 'Quod ipsa fornicata est, ut prædicitur, & quod ipsa non debet convinci in formâ prædictâ, & de hoc se ponit super patriam; & Margeria similiter. Ideò Venire faciat, &c. Postea Jurata dicunt, quod prædicta Margeria post mortem prædicti Johannis viri sui fornicata est cum prædicto Will'o de Emesby, de quo conceperat prædictum Will'm filium suum, & quod Lex & consuetudo de Gavelykynde talis est, quod si uxor post mortem viri sui nuserit se, vel fornicata

In a Writ of
Dower.

Book II. *‘fornicata fuit, amittit Dotem suam, & quòd non necesse est quòd ipsa capiatur cum puero suo in parturiendo cum Hutesio & Clamore. Ideo Consideratum est quòd Willas & alii eant inde sine die, & prædicta Margeria nihil capiat, &c. Sed sit in msa, &c.’*
 Verdict finds the Custom of Gavelkind to forfeit Dower for Fornication, tho’ no Hue and Cry, &c.

To this may be added *Trin. 5 Ed. 2 Coram Rege, Rot. 4. Kanc. Alice late Wife of Walter Northwoode brought an Action of Trespass against Henry Northwoode, and three others, for breaking and entring her House at Mepebam, &c. The Defendants*

Plea, that the Plaintiff being Tenant in Dower in Gavelkind, forfeited by the Custom, for Fornication.

pleaded, ‘Quod Mos & Consuetudo de Gavelingkinde in partibus illis talis est quòd Uxor post mortem viri sui, quamdiu se benè & honestè gesserit, habebit medietatem omnium terrarum & tenementorum quæ fuerunt prædicti viri sui, & si faciat transgressionem cum aliquo homine post mortem viri sui, amittat Medietatem terrarum, &c. & pro eo quòd prædicta Alicia fecerat Adulterium cum quodam Johanne le Tayllur, & habuit quendam filium Johannem nomine, ipsi Henricus & alii intraverunt domum, &c. secundum consuetudinem prædictam:’ Henry having married the Heir of the Husband. ‘Et prædicta Alicia dicit, quod nullam transgressionem fecit cum prædicto Johanne le Tayllur nec cum aliquo alio; sed prædicti Henricus & alii de injuriâ suâ propriâ, &c. & hoc petit quòd inquiratur per patriam; & prædicti Henricus & alii similiter. Ideo veniat inde Jurata coram Rege a die Sancti Mich. in XV. dies ubicunq; &c.’
 The Plaintiff Nonsuit. *Ad*

Ad quem diem prædicta Alicia non est proſecuta. Chap. II.

And the Words of *Bracton* above cited, *ſicet nupta non ſit, ſi vir inveniatur, vel puer, vel uterque, dotem amittat*, are a further Evidence, that ſhe may forfeit her Dower without being convicted of Child-bearing by the View of the Country.

The Statute *de Prærogativâ Regis* is likewiſe general, that *if ſhe commit Fornication in her Widowhood, or take Husband after, ſhe ſhall loſe her Dower*. And to theſe may be added the other Authorities above cited, which ſay generally, that ſhe ſhall hold the Moiety ſo long as ſhe lives Chaſte. And indeed could the Widow, who breaks this Rule, avoid the Danger of a Forfeiture, by withdrawing to lie in out of the County, the Condition would be but of very little Effect. Ante p. 160.

Theſe Reſtrictions to Chaſtity and a ſingle Life, being Limitations which determine the Eſtate *ipſo facto*, without Entry, not the Heir only, as in Caſe of a Condition, but any Stranger, who is intereſted, may take Advantage of the Forfeiture. *Co. Litt. 214. b.* Who may take Advantage of the Forfeiture.

If Tenant in Dower of Gavelkind ſows the Land, and afterwards forfeits her Dower by Marriage or Fornication, the Heir ſhall have the Emblements, for her Eſtate is determined by her own Act. So if ſhe makes a Leaſe for Years, and then takes Husband, the Leſſee ſhall not have the Emblements; for tho' his Eſtate is determined by the Act of another, yet he ſhall not be as to the Heir Of Emblements after Forfeiture. 2 Inſt. 81.

Book II.

Where an
Action lies
for calling
Tenant in
Dower in
Gavelkind
Whore.

Heir in a better Condition, than his Lessor was. 5 Rep. 116. *Oland's Case*, which was the Case of a Feme Copyholder *durante viduitate*.

As Tenant in Dower of Gavelkind Lands holds only while she remains sole and chaste, she may maintain an Action against any Person calling her Whore, if done to impeach her Estate; within the Reason of the Case of *Bois and Bois*. 1 Sid. 215. 1 Lev. 134. Action on the Case for saying to a Widow, who held an Estate while she continued sole and chaste, that she was a Whore, and that he would throw her out of her living; falsely and maliciously with an Intent to oust her of her Estate: Moved in Arrest of Judgment, that no special Damage being laid, the Words were not actionable; but the Court held, that the Words coupled with the Declaration of the Party, import Damage in themselves in respect of her Estate.

Of the Custom not to forfeit Dower for Felony, see *post*. c. 4.

3. Of What
Things she
shall be en-
dowed of a
Moiety.

3. As a Woman is to be endowed at Common Law of Lands and Tenements, *Litt. Sect.* 36. and *Co. ibid.* so is she dowable of all Lands and Tenements in Gavelkind, as appears by the *Customal of Kent infra*. And the Writ of Dower in this Case, as well as the other, is *de Libero Tenemento*, of the Husband; from whence it might naturally be inferred that the Dower is equally extensive in both Cases.

But

But though a Woman shall be endowed at Chap. II.
 Common Law of the third Part of the Pro-
 fits, of a Fair, *Co. Litt. 32. a. Fitz. Dower*, ^{Whether of a}
 81. yet it is said, that if the Custom be that ^{Bailiwick, or}
 a Woman shall have for her Dower the Moiety ^{Profits of a} Fair.
 of all the Lands and Tenements, which were
 her Husband's, holden in Socage within such
 a Precinct, if the Husband had a Bailiwick or
 Fair in Fee during the Coverture holden
 within the same Precinct, the Wife shall
 not have the Moiety thereof for her Dower,
because it is no Tenement, and a Custom shall
 be taken strictly. *Perk. Sect. 435. Lamb.*
⁶¹⁹
³³⁸ *Noy's Max. 28. 2 Sid. 139. Per*
Newdigate Justice. And 12 *Ed. 2. Dower*
 157. seems to be to the same Purpose, though
 the Case is somewhat obscure. But other-
 wise it is of a Bailiwick or Fair appendant
 to a Manor or Land holden in Socage
 within such Precinct. *Perk. Sect. 436. Lamb.*

The first is undoubtedly true, if it be un-
 derstood only of such Profits of a Fair, as
 arise merely from the Franchise, as Toll, &c.
 and issue not out of the Land; for these not
 being holden by any Tenure cannot be of
 the Nature of Socage, and consequently not
 Gavelkind; but as such Profits of a Fair,
 which are rather issuing from the Land than
 from the Franchise, (as Pickage and Stallage)
 may be of the Nature of Gavelkind with ^{Ante 79.}
 regard to the Inheritance, there is no Reason
 why the Widow should not have equal Ad-
 vantage with the Heirs, and be intitled to a
 Moiety of them, as incident to the Soil of
 N which

Book II.



Co. Litt. 6.

a. 19 b.

which she is endowed, they coming properly under the Description of the Word *Tenements*; which is a very large Term, comprehending not only Lands, and other corporeal Inheritances, which are or may be holden; but also all Inheritances issuing out of any of them, or concerning, or annexed to, or exerciseable within the same, though they lie not in Tenure; as Offices, Rents, Commons, Profits *apprender* out of Lands, and the like, wherein a Man has any Franktenement, and whereof he is seised *ut de libero Tenemento*.

And accordingly Dower was demanded of the Moiety of Stallage arising from a fair holden on Gavelkind Lands; and it was adjudged good without saying a Moiety of the Profits of the Stallage; for the Stallage is the Profits, and a Woman may be endowed of a Moiety of Stallage. 11 *Ed. 3. Fitzb. Dower*, 85.

- Of Common
in Gross.

Dower demanded of a Moiety of Pasture for sixteen Oxen, and six Cows, &c. to common in 500 Acres of Wood: Exception taken, that the Writ is *de libero Tenemento*, and the Demand of Common of Pasture, and therefore the Demand not warranted by the Writ; but the Court held it good, for that if she could not recover by this Writ and by this Demand, she would be without Remedy. 13 *Ed. 2. Dower* 161. *Mayn.* 405. S. C.

Of a Rent.

Rent or Common out of Land in Gavelkind, Borough English, & *buysmodi*, which is of antient Time, shall be of the Nature of the Land, so as a Wife shall be endowed of

of a Moiety, &c. *contra* of a Rent or Common newly granted, and therefore she shall be driven to shew, whether it is Common newly granted, or continued Time out of Mind, notwithstanding she alledge, that by the Custom of the Country the Wife shall have a Moiety of her Husband's Freehold in Dower. 4 *Ed.* 3. 32. *Fitzb. Dower*, 113. *Bro. Custom*, 58. But as it is now settled, that a Rent, though newly granted out of Gavelkind Land, shall follow the Nature of the Land, there is the same Reason, that the Wife shall be endowed of a Moiety, as that all the Sons shall inherit.

That a Woman shall not be endowed of a Moiety of Tithes impropriate issuing out of impropriate Lands in Gavelkind, *vide ante* 86.

4. The Words of the *Customal*, according to *Lambard's* Copy, are, that the Wife shall be endowed of a Moiety of the Tene-
ments whereof her Husband *morust vestu e seist*; and Mr. *Lambard* $\frac{6}{7} \frac{1}{8}$ is of Opinion, that the Wife shall not by this Custom be endowed of a Seisin in Law, as she should at the Common Law; but only of such Lands whereof her Husband was actually and really seised; the Word *Vestu* (according to his Interpretation) inforcing a Possession in Deed, and not in Law only: But he cautiously bids us enquire how the Usage is.

4. Of what Estate of the Husband a Woman shall be endowed of a Moiety. Whether of a Seisin in Law.

There is no Case in the Books to warrant this Opinion; and it is observable that the Word *Vestu* is not in the Edition of the *Customal* printed by *Tottel*, nor in a Manuscript

Book II.



manuscript Copy of that Record fairly written on Vellum amongst a Collection of the old Statutes now in *Lincoln's Inn* Library. But were Mr. *Lambard's* the right Reading, it might bear some Doubt whether he has not put too strong an Interpretation on this Word; for an Estate *vested*, by no means imports that the Tenant has a Seisin in Deed, but only that the Estate is not in Abeyance or Contingency; and undoubtedly the Estate *vests* in the Heir at Law immediately on the Death of his Ancestor, which is before Entry called a Seisin in Law.

But let the proper Sense of this single Word be what it will, it can scarce be sufficient to add so unreasonable a Qualification to the Custom, as that the Laches of the Husband in gaining an actual Seisin by Entry, shall prejudice the Wife, without a strong Usage accordingly.

Whether of the Husband's Estate aliened during the Coverture.

Another Question may arise on the Words *morust seizi, viz.* Whether the Custom be, that the Wife shall be endowed of a Moiety only of such Lands whereof Husband *died* seised?

And I take it there is no Difference in this Respect between the Common Law, and the Custom of *Kent*, but that, as is laid down in *Lamb. Peramb.* $\frac{615}{555}$, a Woman after the Death of her Husband shall have a Moiety of all such Lands of Gavelkind Tenure, whereof he was seised of an Estate of Inheritance during the Coverture.

For

For the Demand of this customary Dower of a Moiety is not of such Lands and Tenements only, of which the Husband *died* seised; but on the contrary in the *Old Entries* 109. and *Raft.* 237. is a Precedent of a Count in Dower, wherein the Demandant lays the Custom to be, that the Wives are dowable of a Moiety of the Tenements in Gavelkind, whereof their Husbands were seised after the Espousals.

And this Matter is put out of Doubt by the constant Manner of pleading *ne unq; seizi que Dower* to Demands of this customary Moiety, which is always in the common Form, *Die quo ipsam desponsavit, nec unquam postea, fuit seifitus, &c. ita quod ipsam inde dotare potuit.* Instances whereof may be found in *Itin. Kanc.* 55 *H.* 3. *Rot.* 25. 34. *in dorso.* 48, 84, 89. *Itin. Kanc.* 7 *Ed.* 1. *Rex Roll.* *Rot.* 6, 10, 14, 22, 23. *Itin. Kanc.* 6 *Ed.* 2. *Rot.* 12, 28, 34, 103. 20 *Ed.* 3. *Ryley's Plac. Parl.* 112. *Rob. Ent.* 242, 271. And in *Coke's Ent.* 248. is a Judgment for the Tenant in Dower of Gavelkind Lands on this Issue found for her.

And lastly in the Case of *Davis* and *Selby*, *Cro. Eliz.* 825. It was adjudged, that the Wife should be endowed of a Moiety of such Lands of the Tenure of Gavelkind in *Kent*, as her Husband had aliened during the Coverture.

If two Men be Coparceners of Land in Gavelkind, and they make Partition, and one of them takes a Wife, and the other is impleaded for his Part, and prays in Aid of his

Not of Lands recovered *pro rata* in Aid.

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Coparcener, and he joins in Aid; and the Demandant recovers, and the Tenant has *pro ratâ* of that which was in the Possession of his Coparcener; and the Coparcener of whom the Aid was prayed dies; his Wife shall not have Dower of that which the other Coparcener has *pro ratâ*, because the Title of him, who has *pro ratâ*, shall have Relation to Time of the Death of their Ancestor. *Perk. tit. Dower, pl. 310.*

5. What Remedies lie for this Dower.

5. A Woman shall have the same Remedies for this customary Dower of Gavelkind, as for Lands at Common Law; as a Writ of Dower *unde nihil habet* in the common Form, *quòd reddat ei rationabilem dotem, &c. de libero Tenemento, &c.* and in her Count she shall demand the Moiety by the Custom. *Mayn. Ed. 2. 405. 30 Ed. 3. 26. a.* Or a Writ of Right of Dower of a Moiety according to the Usage of Gavelkind, where she has received Part, and is deforced of Part, *F. N. B. 8. H.*

As the Statute of *Merton, c. 1.* (which gives to the Wife deforced of her Dower, where the Husband died seised, Damages to the Value of the mean Profits of her Dower) is construed to extend to Copyholds, where by the Custom the Wife is dowable; for that when she is endowed she shall have all Incidents to Dower; *4 Rep. 30. b. Shaw's Case, Co. Litt. 33. a.* it seems that with equal Reason at least it will extend to Dower of Gavelkind Lands. And *Fleta, lib. 5. c. 24. f. 344.* speaking of this Provision of the Statute of *Merton*, and of Writs of Dower *unde nihil habet,*

habet, says, 'Primum commune breve, ut
'supra, per quod petitur tertia pars Tene-
'menti, quod fuit viri sui die quo eam de-
'sponsavit, & postea, & aliquando Medietas,
'sicut de Socagio; non tamen de omnibus
'Socagiis, sed de antiquis, & de iis de qui-
'bus mulieres dotari consueverunt secundum
'loci & patriæ Consuetudinem: Quod qui-
'dem breve quandoq; fit clausum, cum
'mulieres nihil habent omnino, & quandoq;
'patens, cum aliquid habuerint, & aliquid
'defecerit. In brevi autem clauso adjudi-
'cantur damna Mulieribus, sed in patenti
'non.'

6. As Dower of a Moiety is against com- 6. Of the
mon Right, some Cause must undoubtedly be alledged for it in the Demand. *Fitzb.* Manner of
Dower, 64, 65. 7 *Ed.* 3. 10. 10 *Ed.* 3. 35. demanding
13 *Ed.* 3. *Voucher* 20. 30 *Ed.* 3. 26. a. Dower of
Gavelkind
Lands.

But the Question is in what Manner such special Cause must be alledged:

It said in 5 *Ed.* 4. 8. *b.* That where a Woman is to be endowed of a Moiety of Gavelkind Lands, it is sufficient to shew the Custom without prescribing in it. *Fitzb. Custom*, 4. *Note*, the Book itself is misprinted, the Word *nemi* before *prescriber* being omitted.

Dower demanded of a Moiety of 24 Acres of Land, for that the Land is of the Tenure of Gavelkind, & *secundum Consuetudinem in Com.* Kanc. *ab antiquo usitatam*, Women ought to be endowed of a Moiety of such Lands; the Tenant prayed Judgment of the Demand, because it was not said, according

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to the Custom, *a tempore a quo non existit memoria usitatam*. But the Prothonotary certified that the other was the constant Course, and the Court said, they well knew there was such a Custom, and therefore awarded that the Tenant should answer. 2 Ed. 4. 19.

And there are several Precedents of Demands of Dower in *Kent* in this Manner in *Rast. Ent.* 235. *a.* 238. *b.* 239. *b.* But it seems this Manner of Demand would not be good for Dower of a Moiety of Lands in any other County, but the Custom ought to be more precisely alledged; as in the Precedents for Dower of a Moiety of Lands in *Norwich*, or within the Fee of *Richmond*. *Rast.* 235. *a.* 238. *b.*

And indeed it has been of later Times the more common Way to demand Dower of Gavelkind Lands in *Kent* according to the Custom *Time out of Mind* used, as appears by the Precedents, *Old. Ent.* 109. *Rast.* 237. *a.* *Co. Ent.* 248. 1 *Brownl. Decl.* 112. *Rob. Ent.* 267, 268, 285. And certainly this is the more adviseable and safe Way of Pleading since the Opinion of the Court, in the Cases of *Launder* and *Brooke*, and *Wiseman* and *Cotton*, that they will not take Notice of the particular Customs annexed to Gavelkind Lands, unless specially pleaded.

Another Exception taken to the Form of the Demand of this customary Dower in 2 Ed. 4. 19. was, that the Demandant did not shew, that she was without Husband, according to the Custom. But this is never averred in the Count, as appears by all the Precedents; and

and being a Condition to defeat her Estate, according to the general Rule laid down in 7 Rep. 10. *Ughtred's Case*, it ought to come on the Part of him that would take Advantage of it.

7. Mr. *Lambard* thinks, that this customary Dower differs from the Common Law in the Manner of Assignment; for that if the Wife recover her Dower at Common Law, she ought of Necessity to be endowed by Metes and Bounds; but in Dower after the Custom she may very well be endowed of a Moiety, to hold in Common with the Heir, who enjoys the other Half. And in this he is followed by Mr. *Noy* in his *Maxims*, p. 28.

7. How Dower of a Moiety is to be assigned. *Peramb.* 612. 359.

But the Instance put in *Perkins tit. Dower*, pl. 412, which Mr. *Lambard* cites as his Authority for this Position, is only of an Endowment of the Wife by the Heir, with her Agreement to hold in Common; and this is good by her Assent. And 8 Ed. 2. *Itin. Kanc. Fitzb. Entre*, 75. is to the same Purpose. Though in Truth the Case was in 6 Ed. 2. *Itin. Kanc.* and is more clearly reported amongst Cases of that *Eyre*, given by Ch. J. *Hale* to *Lincoln's Inn*; where *Spigurnel Just.* (who gave the Rule) holds, that the Law will well suffer the Heir to assign Dower to his Mother to hold a Moiety in Common with him *per mi & per tout*, but that it would be otherwise, if she were to recover her Dower by Judgment.

And though Consent of both Parties may take away the Necessity of an Assignment in Severalty, as well in Dower of a third

Style 276.
Roll's Abr.
Part, 682. X. pl. 3.

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Part, as of a Moiety, yet it is certain, that where the Wife recovers this customary Dower by Course of Law, the Sheriff ought to assign it by Metes and Bounds, equally as in case of Dower at Common Law; as is expressly holden in the Case of *Davies and Selby*, Cro. Eliz. 825. That the Widow shall have the Moiety of Gavelkind Lands by Assignment in Severalty, and cannot hold in Common. And so 1 *Keb.* 583. That Feme Tenant of a Moiety in Dower by the Custom of *Kent*, doth recover by Metes and Bounds, and is no Tenant in Common, unless she were the Wife of a Tenant in Common.

Itin. Kanc. 39 H. 3. Rot. 19. in dorso. In a Writ of Right, ‘*Jordanus & Godelina dicunt, quod non possunt respondere; quia prædicta Godelina dicit, quod ipsa nihil clamat in prædicta terrâ nisi nomine liberi banci sui de dono cujusdam Rogeri le Bonde, patris prædicti Jordani & quorundam Gilberti & Richardi, cujus hæredes ipsi sunt; Et dicit quòd ipsa & prædicti Jordanus, Gilbertus, & Richardus tenent prædictam terram in communi pro indiviso, ita quòd liberum bancum suum nondum ei assignatum est.*’

And *Litt. Sect. 43.* speaks of Dower of a Moiety, according to the Custom, *to hold in Severalty*: Which may be a sufficient Answer to what is said *obiter* by *Ferman Just. Style 277.* in the Case of *Booth and Lambert*, that if Dower be of a third Part, it ought to be by

by Metes and Bounds generally; but if of a Moiety, it is not so. Chap. II.

Trin. 22 *Jac.* 1. *Rot.* 3286. 1 *Brownl. Decl.* 112. The Judgment in Dower of a Moiety of Gavelkind Lands is, to hold to the Widow in Severalty by Metes and Bounds: Though it is not necessary that the Judgment be so particular.

Indeed if there be two Coparceners in Gavelkind, and one takes a Wife and dies before Partition made, the Widow must of Necessity be endowed of the Moiety of a Moiety, to hold in Common; in like Manner as at Common Law the Widow of a Tenant in Common shall be endowed of a third Part of a Moiety, to hold in Common with the Heir and the other Tenant, for that in this Case her Dower cannot be assigned by Metes and Bounds. *1 Keb.* 583. *Litt. Sect.* 44.

This Distinction is supported by the Reason of the Law in other Cases: The Statute *Westm.* 2. c. 18. enacts, that the Sheriff shall upon an *Elegit* deliver to the Plaintiff a Moiety of the Land of the Debtor; and the Construction upon this has been that he shall deliver the Moiety by Metes and Bounds, unless the Defendant be a Jointenant, or Tenant in Common; and then this must be specially set forth in the Return. *Hutt.* 16. 1 *Brownl.* 38. 1 *Vent.* 259.

Mr. *Lambard* puts a Question, whether 8. Whether a Woman entitled to Dower in Gavelkind by custom a may wave her Dower of a *Moiety* after this Dower can Custom, and bring her Action to be en- be waved for dowed of a *third Part* at Common Law, Dower at Common and so exempt herself from the Danger of Law, the

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the customary Conditions, or no? And he mentions, that he once heard two Reverend Judges of Opinion, that the Woman was at Liberty to demand her Dower of a Third or of the Moiety; but that it was uttered by them on sudden Speech, and not on studied Argument. *Peramb.* $\frac{622}{339}$, $\frac{621}{380}$. And he seems to mean the Opinion of *Anderson* and *Windham*, Justices, reported 1 *Leon.* 62. Which, as it was a sudden Opinion, so it is contrary to both the former and later Resolutions.

Certification
of Assise.

Plac. Ass. 52 H. 3. in *Com. Kanc. int. Ass. de divers.* *Com. Rot.* 17. ‘Præceptum fuit Vicecomiti, quod venire faciat hîc ad hunc diem Juratores Assisæ novæ disseisinæ, quam *Thomas de Kanciâ & Cæcilia* uxor ejus arrianaverunt coram *Roberto Fulcone* versus *Johannem de Ripariis, Will’um de Tracy, Radulphum de Bray, Johannem de Tracy & Margeriam* uxorem ejus, de tenementis in *Newton*, viz. de tertiâ parte unius Carucatæ terræ, ad certificandum de quibusdam articulis assisam prædictam tangentibus.

Count that Plaintiff in the original Assise recovered a Third Part of a Carve of Land, as her Dower; and that by the Custom of *Kent* she forfeited by marrying again.

‘Et prædicti *Thomas & Cæcilia* non venerunt, & prædicti *Johannes, Will’us, Radulphus, & Johannes* venerunt, & dicunt quod prædicti *Thomas & Cæcilia* per prædictam Assisam recuperaverunt feisinam suam de prædicto tenemento ut dotem ipsius *Cæcilie*; & dicunt quod Consuetudo Comitatus *Kanciæ* de tenemento, quod tenetur in *Gavelkynde*, talis est, quod quamcito mulier, quæ dotata est de hujusmodi tenemento, nupserit se alicui, quod ipsa amittat dotem suam

‘ suam de tenemento, quod tenetur in *Gavelikende*; & quia prædicta *Cæcilia* nupsit prædicto *Thomæ*, prædictus *Will’us* de *Tracy* seifivit prædictam *tertiam partem* in manum suam, ratione prædictorum *Johannis & Margerie*, qui sunt in Custodiâ suâ, ut Jus & Hæreditatem ipsius *Margerie*, sicut ei bene licuit per prædictam Consuetudinem; unde dicunt, quod Assisa prædicta minus sufficienter examinata fuit super prædicto articulo.

‘ Et Juratores examinati super isto articulo dicunt, quod prædictum tenementum, &c. tenetur in *Gavelykende*, & quod Consuetudo de tenemento, quod tenetur in *Gavelikende*, talis est sicut prædictum est, viz. quod siqua mulier dotata de tenemento, quod tenetur in *Gavelikynde*, nupsierit se alicui, quod amittat dotem suam; Et quod liceat *Warranto* Dotis seifire prædictam dotem in manum suam. Et ideo *Consideratum* est quòd prædictus *Will’us* de *Tracy*, ratione Custodiæ prædictorum *Johannis & Margerie*, rehebeat seifinam suam, &c.’

The Jury find accordingly.

Judgment.

Exception taken to the Demand of Dower of Gavelkind Land in *Kent*, because it was of a *third Part*, and the Count was amended, and made of a *Moiety*. 2 *Ed.* 4. 19.

Dower of Gavelkind Lands in *Kent*, and demanded the *third Part* of the Land of her late Husband; the Defendant * pleaded, that the Custom there is, that Wives shall have a *Moiety* for their Dower, and shall hold it as long as they live chaste and unmarried, & non secundam Cursum Communis Legis; and that the Demandant had taken another Husband,

* See a Precedent of such a Plea, *Robin-son’s Ent.* 245.

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band, and prayed Judgment if she should have her Dower; to which the Demandant demurred: And the Court adjudged, that the Prescription in the Bar was good, being in the Negative; and *Periam Just.* said, that if he had not pleaded in the Negative, yet the Demandant should not have Dower; for the Custom, that Wives shall have the Moiety, is the Common Law in *Kent*, and no other Law runs there. 30 *Eliz. Rot.* 156. *Hunt & Uxor* versus *Gilburne*, *Cro. Eliz.* 121. *Goulds.* 108. 1 *Leon.* 133. *Moor* 260. *Sav.* 91. Indeed the Strength of this Case is much taken off by its being on Demurrer, which confessed the Custom in the negative and exclusive Manner in which it was pleaded.

But it was afterwards, upon Evidence on a Trial at Bar on this Issue, whether it was the Custom of Gavelkind, that if the Husband aliened his Land, the Wife might demand a third Part for her Dower, or a Moiety at her Election, resolved (the Demandant not being able to produce any Precedents, or Proofs, that there was any other Dower of Gavelkind Lands in *Kent* than Dower by the Custom) that the Custom precisely is, that she shall have a * Moiety; and as it is for the Benefit of the Tenant of the Freehold, that she should have the Moiety, she being thereby under the Restraint to hold it only while she lives sole and chaste, she is bound by the Custom, and

* This is likewise said to have been the Opinion of Lord Dyer. 1 *Leon.* 61.



cannot wave it. *Davies & Ukor* versus *Selby*, *Cro. Eliz.* 825. and the same Case is cited *Moor* 260. Which overthrows the Distinction to which Mr. *Lambard* seems to incline, from the Words of the *Customal, Morust seizi*, That the Conditions laid upon this Dower run only to those Lands, whereof the Husband died seised, and that of such as he aliened the Wife was at Liberty either to demand Dower at the Common Law, or otherwise. *Peramb.* $\frac{6}{3}; \frac{8}{8}$.

By the Custom of Gavelkind, the Wife shall be endowed of a Moiety as long as she keeps herself sole, and without Child, which she cannot wave, and take her Thirds for Life, for in that Case *Consuetudo tallit communem Legem.* *Co. Litt.* 33. b.

By the Statute of *Merton*, c. 2. All Widows may devise the Crop growing on the Lands, which they hold in Dower; which Words, *All Widows*, being general, comprehend Dower by the Custom, as well as other Dower. 2 *Inst.* 81.

Of devising
the Crop on
customary
Dower.

Before Endowments *ex Assensu Patris* were Dower *ex assensu Patris*.
disused by the Frequency of Jointures, the only Son of Tenant in Gavelkind could not have endowed his Wife *ex Assensu Patris* of such Lands, because, tho' he is Heir apparent at that Time, yet there is not that constant and perpetual Apparency that is necessary for that Purpose, since another Son may be born, that will have an equal Right to the Inheritance. *Co. Litt.* 35. b. 6 *Rep.* 22. a.
And

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And the same Law of the youngest Son and Heir apparent in *Borough English*. *Co. Litt.* 35. b. 3 *Rep.* 38. a. 6 *Rep.* 22. a.

In what
Places Dower
of a Moiety
may be sup-
ported.

Note, A Custom to have a Moiety, or the whole for Dower is so far favoured in Law, that it may not only be in a County, City, or ancient Borough, but likewise in any Upland Town, which is neither City nor Borough. *Co. Litt.* 33. b. 21 *Ed.* 4. 53. b. *Barre*, 119.

The Lands in the Territory of *Urchenfeld* in *Herefordshire*, which descend after the Manner of Gavelkind, have the same Privilege of Dower of a Moiety, as those in *Kent*. *Taylor on Gavelk.* 109. So have the partible Lands within the Port of *Rye* in *Sussex*.

C H A P. III.

Of the Customary Wardship, and of Alienation by an Infant Tenant in Gavelkind.

BY the old Common Law Guardianship Of Wardship. in Socage continued a Year longer than it does at present; as we see by the 70th Law of *Hen. 1.* ‘Siquis Pater mortuus fuerit, & filium vel filiam hæreditariam reliquerit, usq; ad XV ætatis annos, nec causam prosequantur, nec judicium subeant, sed sub tutoribus & actoribus sint in parentum legitimâ tutelâ, &c.’ And *Bracton*, speaking of Wardships, f. 86. b. says, ‘Si fuerit Hæres Sockmanni, tunc demum cum XV annos compleverit, ætatem habere intelligitur.’ So likewise *Glanv. lib. 7. c. 9.* And this is still the Age by the Custom of *Kent*; for if Tenant in Gavelkind die leaving his Heir or Heirs within the Age of Fifteen, the next of Blood, to whom the Inheritance cannot descend, shall (by the Appointment of the Lord, if there be several in equal Degree of Kindred) have the Custody of the Body, Lands, and Goods of such Infant Heir, until he attain to that Age; even as the Guardian in Socage at Common Law shall, till the Ward is fourteen Years old: But the Lord shall take nothing for the Appointment, nor ought he to tender any Marriage to the Heir. And when the Heir arrives at the Age of Fifteen,

○

this

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this customary Guardian shall deliver up his Goods and Lands to him with the Improvements, and in all Things shall be charged and have Allowance as Guardian in Socage at Common Law, *Consuetud. Kanc. infra. Lamb. 611, 624.*

What Remedies to compel the Guardian to account.

But over and above the common Remedy for the Ward against the Guardian by Action of Account, the Lord may by the Custom distrain the Guardian to yield his Account. *Lamb. Peramb. 611, 624.*

Replevin; the Defendant makes Conuſance as Bailiff of the Abbot of *St. Austin's* in *Canterbury*, for that the Usage of Gavelkind is, that the Heir, when he comes to the Age of fifteen Years, shall come to the Lord's Court, and demand his Inheritance, and the mean Profits of the Land; and the Lord by Usage of the Country, by Reason of his Seigniorship, shall cause his Land to be delivered to him, and distrain his Guardian to yield his Account; and if he be found in Arrear, the Lord shall levy of him the Arrears by Distress; and accordingly makes Conuſance under the Warrant of the Steward of the Abbot, who was the Lord, to levy the Arrears. *18 Ed. 2. Fitzb. Avowry, 220. Mayn. Ed. 2. 610.*

As an Action of Account lies at Common Law against Guardian in Socage *de son Tort*, *Litt. jess. 124.* So this Custom of compelling an Account by Distress extends to him, who is actually Guardian, whether by Right, or not. *18 Ed. 2. Avowry, 220. Mayn. Ed. 2. 610.* And Guardian by this Custom, though not *Procchein Amy*, but *de son Tort*, shall in like

like Manner be chargeable in an Action of Account by the Heir, as soon as he arrives at the Age of Fifteen. 29 *Ed.* 3. 4. *b.* Chap. III.

But tho' the Guardian be himself accountable, yet the Lord, or his Heirs, stand chargeable in Default of the Ability of him, to whom they so commit the Custody. *Customal of Kent, infra.* And this is the Reason why at this Day they seldom intermeddle in the Matter. *Lamb.* $\frac{612}{333}$, $\frac{623}{363}$. When the Lord is chargeable in Default of the Guardian.

It is certain that this Custom of Gavelkind, as to the Person to whose Custody and Care the Infant is committed, differs not in general from the common Socage Guardianship. *Rot. Claus.* 37 *H.* 3. *m.* 19. *in dorso.* 'Rex Vic. Kanc. Salutem. Certum

'est, & nulli sapienti de regno nostro' dubium, quòd terrarum, quæ tenentur in Socagio vel Gavelikende, nulla pertinet ad Dominos earundem terrarum custodia, sed solummodò ad parentes propinquiores ex illâ parte, qui ad Successionem hæreditariam aspirare non possunt, &c.

'And *Itin. Kanc.* 43 *H.* 3. *Rot.* 13. *Hundredum de Middelton.* Juratores præsentant, quòd cum consuetudo sit per totam *Kanciam*, quòd quando aliquis obierit, qui terram teneret in Gavelikende, & Hæres suus sit infra ætatem, mater, vel parens propinquior ipsius hæredis ex parte matris habere debeat Custodiam ipsius hæredis, & terræ suæ ad *appruandum*, & respondendum de exitibus ejusdem terræ prædicto hæredi, cum ad ætatem pervenerit, & hoc absq; aliquo sine inde capiendo, &c.

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Affize.

The Tenant
pleads, that
the Tene-
ments are
Gavelkind
holden of the
Archbishop of
Canterbury;

who by the
Custom is in-
titled to the
Wardship of
the Tenant;

and the Plain-
tiffs being In-
fants he
granted the
Custody of
them to R.D.
who assigned
it to J. M.
who granted
it to the Te-
nant.

Yet formerly the Archbishop of *Canterbury* claimed, in Right of his Seigniori, the Custody of the Body and Lands of the Ward, who held of him in Gavelkind, as a Thing assignable; as appears by *Itin. Kanc. 6 Ed. 2. Rot. 7. in dorso.* ‘*Affisa venit*
‘*recognitura si Thomas filius Thomæ de Sand-*
‘*wico, & alii disseisiverunt Will’um filium Jo-*
‘*bannis de Hellis, & Thomam fratrem ejusdem*
‘*Willi, de, &c. Et prædictus Thomas fi-*
‘*lius Thomæ dicit, quòd ipse nullam fecit in-*
‘*juriam, &c. Dicit enim, quòd prædicta*
‘*tenementa sunt de Tenurâ de Gavelykynde,*
‘*& tenebantur de Roberto nuper Archie-*
‘*piscopo Cantuar,’ &c. Et dicit quòd ta-*
‘*lis est Consuetudo in Comitatu isto, quòd*
‘*post mortem tenentium hujusmodi tenemento-*
‘*rum de Archiepiscopatu, hæredibus eorum*
‘*infra ætatem existentibus, seisciri debent tene-*
‘*menta illa in manus ipsius Archiepiscopi, qui*
‘*pro tempore fuerit; qui quidem Archiepisco-*
‘*pus habebit Custodiam prædictorum tenemen-*
‘*torum, & Nutrituram Hæredum prædictorum*
‘*usq; ad plenam ætatem eorundem secundum*
‘*Consuetudinem prædictam: Et dicit quòd*
‘*post mortem prædicti Johannis Patris præ-*
‘*dictorum Will’i & Thomæ, cujus hæredes,*
‘*&c. prædictus Archiepiscopus seiscivit tene-*
‘*menta prædicta unde, &c. in manum*
‘*suam, nomine Custodiæ in formâ prædictâ,*
‘*& custodiam illam commisit & concessit*
‘*Roberto de Dene propinquiore sanguine*
‘*prædictorum hæredum, cui tenementa illa*
‘*descendere non potuerunt, &c. Qui qui-*
‘*dem Robertus custodiam prædictam con-*
‘*cessit cuidam Johanni de Malemeyns, &*
‘*idem*

' idem *Jobannes* ipsi *Thomæ*, tenendum usq; Chap. III.
 ' ad plenam ætatem: Et dicit, quod præ-
 ' dicti hæredes adhuc sunt infra ætatem; & Verdict that
 ' hoc paratus est verificare per Assisam. the Plaintiffs
 ' Ideo capiatur Assisa. Juratores dicunt Age, &c.
 ' super sacramentum suum, quòd prædicti
 ' hæredes non sunt plenæ ætatis secundum
 ' consuetudinem de Gavelkynde. Idèò
 ' consideratum est quòd prædictus *Thomas* Judgment for
 ' filius *Thomæ* eat inde sine die, & prædicti the Tenant.
 ' *Willus* & *Thomas* nihil capiant per Assisam,
 ' &c.

' So in *Itin. Kanc.* 21 Ed. 1. *Berewicke*
 ' *Roll. Rot.* 35. in dorso. Assisa venit re-
 ' cognitura si *Tbo' Rike* injuste disseisivit *Jo-* Assize.
 ' *bannem* filium *Radulphi Alged* de libero
 ' tenemento suo in Villâ de Scto. *Nicholao* in
 ' *Taneto*, &c.

' Postea venit prædictus *Thomas*, & dicit, The Tenant
 ' quod liberum tenementum prædictorum pleads, That
 ' tenementorum est prædicti *Jobannis*, & the Arch-
 ' quod tenementa illa tenentur in Socagio: bishop com-
 ' Dicit etiam, quòd ipse nichil clamat in mitted to him
 ' prædictis tenementis, nisi custodiam ratione of the Plain-
 ' minoris ætatis prædicti *Jobannis*, ex Com- tiff and these
 ' missione Ballivorum Archiepiscopi *Can-* Lands, &c.
 ' *tuariensis*, quibus ipse securitatem invenc-
 ' rit de rationabili compoto suo inde reddend-
 ' do prædicto *Jobanni*, secundum consuetu-
 ' dinem de Gavelekynde, cum prædictus *Jo-*
 ' *bannes* ad plenam ætatem pervenerit, &c.
 ' & dicit, quod ipse modò paratus est hîc
 ' hujusmodi securitatem invenire, &c.

' Juratores

Book II.

Verdict finds accordingly, and that by the Custom of Gavelkind the Archbishop might commit to whom he would the Custody of the Body and Lands of his Tenant under Age, &c.

Judgment for the Tenant.

Affize.

‘ Juratores dicunt super sacramentum suum, quod prædictus *Radulphus* obiit feitus de prædictis tenementis, ut de feodo; post cujus mortem Ballivi Archiepiscopi *Cantuar.* Custodiam prædictorum tenementorum, eò quod sunt de Gavelkynde, & Nutrituram corporis prædicti *Jobannis* commiserunt cuidam *Jobannæ* matri prædicti *Jobannis*, qui est infra ætatem, tenendum usq; ad legitimam ætatem ejusdem *Jobannis*, prout prædicto Archiepiscopo, per consuetudinem de Gavelekynde bucusq; usitatam, bene licuit hujusmodi Custodias cui-
cunque committere: Dicunt etiam, quòd prædicta *Jobanna* postea desponsata fuit prædicto *Thomæ*, & postea obiit; post cujus mortem prædictus *Thomas* satisfecit Ballivis prædicti Archiepiscopi pro custodiâ prædictâ usq; ad legitimam ætatem ejusdem *Jobannis* retinendâ ad commodum prædicti *Jobannis*, & ad reddendum inde prædicto *Jobanni* rationabilem compotum suum, cum ad legitimam ætatem pervenerit; per quod prædictus *Thomas* Custodiam illam semper postea retinuit. Ideò Consideratum est quòd prædictus *Thomas* eat inde sine die, & *Jobannes* filius *Radulphi* in mîa pro falso clamore, &c. Pardonatur quia infra ætatem.’

But the Right of this Claim is deeply struck at by the following Verdict of the same *Iter.*

‘ *Itin. Kanc. 21 Ed. 1. Berewicke. Rot. 72. in dorso.* Assisa venit recognitura si *Radulphus* de *Berners*, & alii injustè disseverunt

‘ siverunt *Willum* filium *Thomæ* de *Moraunt*, Chap. III.
 ‘ *Jordanum* & *Henricum* fratres ejus, de li-
 ‘ bero tenemento suo in *Cbyveming* & *Sevenak*,
 ‘ &c.

‘ Et *Radulphus* & alii veniunt, & *Radul-*
 ‘ *phus* & *David* respondent pro se & aliis, &
 ‘ dicunt, quòd ipsi sunt Custodes Archiepisco- The Tenants
 ‘ patùs *Cantuariensis* ex parte Domini Regis plead, that
 ‘ constituti; & quia prædictus *Thomas*, pater they are Guar-
 ‘ prædicti *Willi* & aliorum, tenuit quandam dians of the
 ‘ partem prædictorum tenementorum de Temporal-
 ‘ Archiepiscopatu, & Archiepiscopi semper ties of the
 ‘ habere consueverunt Custodiam de tenen- Archbishop-
 ‘ tibus suis consimiis tenuræ, & tam de ten- rick of *Can-*
 ‘ nementis, quæ de aliis tenentur, quàm de *terbury*, and
 ‘ illis, quæ tenentur de Archiepiscopatu, ip- that the Arch-
 ‘ si ceperunt prædicta tenementa in manus bishops used
 ‘ Domini Regis post mortem ipsius *Thomæ*, to have the
 ‘ nomine custodire, eò quòd prædicti *Willus* Custody of
 ‘ filius *Thomæ*, *Jordanus* & *Henricus* filii ejus their Tenants
 ‘ & hæredes, sunt infra ætatem. in Gavelkind
 when under
 Age, for all
 such Lands,
 whether hol-
 den of them,
 or not, and

make Title to the Premises accordingly.

‘ Et *Thomas* filius *Thomæ Moraunt*, frater The Plaintiffs
 ‘ prædictorum *Willi* filii *Thomæ*, *Jordani*, & reply, That
 ‘ *Henrici*, & qui sequitur pro eis, benè but Part of the
 ‘ cognoscit, quòd prædictus *Thomas* pater Land is hol-
 ‘ ipsorum tenuit de Archiepiscopatu quan- den of the
 ‘ dam partem prædicti tenementi, viz. Archbishop,
 ‘ unum messuagium, viginti & septem acras and that it is
 ‘ terræ, novem acras prati, et tres acras bosci Gavelkind,
 ‘ tantum; & dicit, quòd tenementum illud and the Ward-
 ‘ est *Gavelykende*, de quo nulla debetur cu- ship thereof
 ‘ stodias, nisi proximo parenti, cui nulla hære- to the next of
 ‘ ditas descendere potest; & qui compotum Kin, &c.
 ‘ suum

Book II.

The Jury find accordingly, but that the Archbishop had usurped the Wardship of some Gavelkind Land, especially on the East Side of the Medway, but without any Right.

‘ suum reddere tenetur, cum hæredes ad ætatem quindecim annorum pervenerint: Dicit etiam, quòd residuum prædicti tenementi est *Gavelykeud*, & non tenetur de Archiepiscopatu immediatè, & dicit quod totum prædictum tenementum est ex parte occidentali aquæ de *Medeway*, ubi tenementa quæ tenentur de Archiepiscopatu, sunt alterius Conditionis quàm illa, quæ sunt ex parte orientali aquæ prædictæ, nec aliqua Custodia inde debetur: Et quòd ita sit petit quòd inquiratur per Assisam; Et quia prædicti Custodes nichil aliud dicunt, idedò capiatur Assisa:

‘ *Juratores* dicunt super sacramentum suum, quòd totum tenementum est *Gavelykend*, & quod prædictus *Thomas*, pater prædictorum *Willi* & aliorum, non tenuit de Archiepiscopatu immediatè, nisi unum mesuagium, viginti & septem acras terræ, novem acras prati, & tres acras bosci tantum; & quòd nulla Custodia inde debetur nisi proximo parenti, cui nulla hæreditas descendere potest, usq; ad quintum decimum annum hæredum, & qui tunc illis compotum suum de exitibus reddere tenetur. Et *Juratores* quæsi si Archiepiscopi de tenemento isto, vel de aliis tenementis consimilis tenuræ, unquam aliquam Custodiam habuerunt, dicunt, quòd *Jobannes* Archiepiscopus, qui ultimò obiit, injuriosè & per potestatem occupavit Custodiam cujusdam terræ, quæ fuit *Baldewyni* de *Aldbam*, post mortem ipsius *Baldewyni*, & similiter Custodiam cujusdam terræ in Manerio de *Northflete* tantum: Et dicunt, quòd prædictus

dictus Archiepiscopus, nec aliquis prædecessorum suorum, unquam plures custodias habuerunt ex parte occidentali aquæ de Medway: Sed dicunt, quòd prædictus Archiepiscopus, & predecessores sui plures Custodias injustè & per potestatem per vices occupaverunt ex parte orientali aquæ prædictæ; & præcisè dicunt, quòd de tenementis tentis in Gavelykend nulla debetur Custodia nisi proximis parentibus, quibus nulla hæreditas descendere potest. Dies datus est coram Justiciariis Itinerantibus ibidem a die Sancti Hillarii in xv dies de audiendo judicio suo. Postea, quia compertum est per assisam istam, quòd prædictus Archiepiscopus, qui ultimò obiit, & predecessores sui fuerunt in seisinâ habendi Custodias de aliis tenementis consimilis tenuræ, & prædicti Custodes partes esse non possunt ad jus hujusmodi Custodiarum discutiendum, Consideratum est quod prædicti Will'us filius Thomæ, Jordanus, & Henricus nihil capiant per Assisam, istam, &c.'

Judgment.
&c.

Tho' the Custom puts some Confinement Of Alienation on the Heir, by keeping him in Ward one by an Infant Year longer than is permitted by the Course of 15. of the Common Law, yet it makes ample Amends to him, by a Favour allowed him afterwards, which is to alien his Lands, as soon as by attaining the Age of 15 Years he is out of that Custody. *Custumal of Kent, infra. Lambard's Peramb.* $\frac{625}{384} \frac{625}{384}$. *Somn.* 146. *Itin. Kanc.* 6 *Ed.* 2. *Rot.* 69. *Trin.* 12 *Ed.* 1. *C. B. Rot.* 68. *Mich.* 11 *Ed.* 3. *B. R. Rot.* 133. *Mich.* 20 *Rich.* 2. *B. R. Rot.* 62. *Plac. Ass. in Com. Kanc.* 15 *Ed.* 2. *Alex. de Greenbethe's*



betbe's Case, 12 Ric. 2. *Mich. Pour's Case*. 9 Ed. 3. 38, 39 Ed. 3. 10. b. 29 Ed. 3. 5. a. 32 Aff. 4. 11 H. 4. 29. b. *Dyer* 301. *Lowe and Paramour. Camd. Britan.* 284. And the Cases *infra*.

Itin. Kanc. 55 H. 3. *Rot.* 5. in dorso.
 * TOTUS COMITATUS recordatur,
 quod quilibet ætatis quindecim annorum tenens, vel tenere clamans aliquam terram in Gavelykynde potest dare vendere terram suam, de quâ fuit in seisinâ, ac etiam remittere & quietum clamare totum jus & clameum, quod habet, vel habere possit in aliquo tenemento petendo; adeò licitè & liberè ficut quilibet alius ætatis viginti & unius anni de tenuris forinsecis, quæ tenentur per servitium militare.

This Custom extends to a Female Heir in Gavelkind of the Age of 15, as well as a Male; as appears by 11 H. 4. 33. *Itin. Kanc.* 55 H. 3. *Rot.* 25. *Aff. in Com Kanc.* 2 Ric. 2. *Post.* . and 4 Ric. 2. *Post.* . and 13 Ric. 2. *Post.* . And is expressly so recorded *per totum Comitatum*, in *Itin. Kanc.* 7 Ed. 1. *Rot.* 47. *Rex Roll.*

The Restrictions attending this Custom.

But the later Resolutions and Practice have added the following proper and reasonable Restrictions to this customary Alienation:

1. That it must be by *Feoffment.* *Lamb.* 627, 566. 11 H. 4. 33. 21 Ed. 4. 24. *Noy's Max.* 40. *Sed. V. Post.* 197.

* For the Meaning of this Expression, See *infra*, c. 7.

And the Livery of Seisin must be *propria manu* of the Infant, and not by Letter of Attorney. *Lamb.* $\frac{627}{327}$. *Noy's Max.* 40. For this Custom to enable a Person disabled by Law, ought to be taken strictly, and therefore shall not extend to Feoffments by Attorney, without a particular Custom for that Purpose; for an Infant can do nothing to pass a Thing out of him by Attorney. 9 *Rep.* 76. *b. Combes's Case.*

Nor does the Custom extend to any other *V. infr.* 197. Conveyance or Assurance; for it shall be taken strictly. *Lamb.* $\frac{627}{327}$. *Noy's Max.* 40.

Therefore the Custom does not enable him to make a Will of these Lands at 15. *Co. Copyb. Sect.* 33.

And if an Infant before 27 *H.* 8. had made a Feoffment warranted by the Custom to his own Use, if he afterwards during his Nonage devised the Use, the general Custom of the County did not extend to make this Devise good; for this Custom shall be taken strictly. 21 *Ed.* 4. 24. *Bro. Custom,* 50. 2. *Roll's Abr.* 779.

The Custom does not extend to the Grant of a Reversion on an Estate for Life. 11 *H.* 4. 33. *Old Bendl.* 33. For that lies not in Livery.

By the Opinion of *Hankford Justice*, 11 *H.* 4. 33. *a.* the Custom does not extend to a Release of a Right. And it is said generally in 5 *H.* 7. 31. *a.* 32. *a.* 41. *a.* that tho' there be a Custom for an Infant of 15 to make a Feoffment, yet his Release is void: But it is not applied to the Custom of this County. Whether the Custom extends to a Release. *V. infr.* 197.

Nor is a Lease and Release warranted by this Custom of *Kent.* *Obiter,* 21 *Ed.*

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Ed. 4. 24. *Bro. Custom*, 50. Indeed it is said in *11 H.* 4. 33. *Bro. Custom*, 15. *Fitzb. Custom*, 11. that though the Custom does not extend to a Release to a Disseisor, because it is no Feoffment, but enures by way of Extinguishment of the Right, yet it does to a Lease for Years and a Release, for that amounts to a Feoffment, because the Freehold passes by the Release.

But on the other Hand it is to be considered, that according to the more modern Opinions at least, the Custom requires the Ceremony of a Livery *propriis manibus*, which is a publick Solemnity wanting in this latter Conveyance. And tho' it be said in our Books, that a Lease for Years, and Release in Fee, are tantamount to a Feoffment, yet no more seems to be meant by this, than that they give as large an Estate; for if a Man in his former Plea pleads a Feoffment in Fee, he shall not maintain it in his second Plea by a Lease and Release, but it will be a Departure. *Co. Litt.* 304. a. 1 *Ed.* 4. 5. And it is certain, that as to many Purposes a Lease and Release has not the Effect of a Feoffment; as to work Discontinuances, purge Disseisins, &c. And the Release of an Infant, operating by the Deed, may by the Common Law be avoided by any Person whatsoever; but the Feoffment taking Effect by the Livery, is, if executed with his own Hand, good, without the Assistance of a Custom, against all Persons but Privies in Blood. 8 *Rep.* 43. *Whittingham's Case*. So that this Custom, which on all Hands is agreed to be taken strictly,

strictly, must receive a considerable Extension, before it can comprehend this other Conveyance.

And it seems still more difficult to extend the Custom to a Bargain and Sale for a Year, operating by the Statute of *Uses* made within Time of Memory, and a Release founded thereon, than to a Lease at Common Law executed by Entry, and a Release.

But when I contend, that this customary Power of Alienation is confined to *Feoffments*, I would be understood to consider the Infant as in actual Possession and Seisin of the Land; for otherwise (as I take it) the Custom will warrant him at the Age of 15 to release his Right in the Lands to him in Possession of the Freehold; and the modern Notion to the contrary may possibly appear, on Examination, to have no better a Foundation, than the single Opinion of Justice *Hankford*, in 11 H. 4. 33. which, as it was disregarded in the very Case, so it was grounded on a Misrepresentation (as it seems) of the Record of 55 H. 3. before cited, arising from a Slip of the Judge's Memory. The Year-Book Case is in Effect no other than this: Ante 194.

In a Writ of Entry *sur cui in vitâ*, as Son and Heir of *Margery*, who was Daughter and Heir of *Margery*, of whose Possession, &c. the Counsel for the Tenant pleads in Bar, that the Lands are Gavelkind; and that the Mother of the Demandant, through whom the Descent was made, released to the Tenant all her Right with Warranty, when she was of the Age of 15; and offers to aver, that the Usage is, that they may at that Age alien

Book II.

Ante 194.

alien by Feoffment, and likewise *release their Right*. But *Hankford* Justice says, you shall not take so large an Averment, for the Usage is of Record in the Time of King *Henry* (to which the Reporter adds a *Quere* what Record he meant; but I have already shewn how the Custom is recorded in the Time of that King) and shall be taken *ex stricto jure*; and the Usage is, that he may make a Feoffment, without other Alienation: But if he makes a Feoffment with Warranty, at such Age, he shall not be bound by the Warranty, for that the Usage does not extend to that; and if I am disseised, and I release, this is not my Feoffment, but a Lease for Years and a Release is a good Feoffment: Then here, when the Right of the Feme was discontinued, and an Action descends to the Heir, though the Heir releases, this is not a Feoffment, but an Extinguishment of the Right of Action; and she could not extinguish her Action while she was within Age. But notwithstanding this, it is remarkable that *Norton*, of Counsel with the Demandant, (being possibly better instructed of the Custom) durst not demur to the Plea, though urged to it by *Thurling, Ch. J.* but passed over, and replied, that the Release was made in the Time of the Grandmother, before any Right accrued to the Mother; and the Counsel for the Tenant being apprehensive of this, relied on the Warranty, &c. *Et sic pendet, &c.*

This Case upon the whole is rather an Authority, that the Custom warrants the Infant to release a Right; since it had otherwise been

been unnecessary to have pleaded that her Right accrued after such Release. Indeed, the Opinion of *Hankford* is partly followed by an *Obiter* Saying in 21 *Ed.* 4. 24. But neither in that, nor in any other of the printed Cases, was the Matter judicially before the Court. And if we have Recourse, for the Decision of this Question, to the Voice of the Country, who are the proper Judges of the special Customs of Gavelkind, Words cannot be more express to comprehend a *Release*, than those of the *whole County* above, in 55 *H.* 3. Ante 194. To which may be added the following Verdicts in the very Point.

The first is *Peter de Merdale's Case*, in *Ilin. Kanc.* 6 *Ed.* 2. *Rot.* 17. The whole Record whereof is inserted above, pag. 143. Where the Demandant being seised of one Moiety of the Gavelkind Inheritance of his late Wife, as Tenant by the Curtesy, and of other Moiety, as Guardian to his two Sons *William* and *Roger*, the Jury find, ' Quod postea prædicto *Will'o* filio

' *Petri* ætatis quindecim annorum existente, quando idem *Will'us* fuit *plene ætatis secundum Consuetudinem de Gavelykynde, scil. post quintam decimum annum completum*, per quodam scriptum confectum apud *London* concessit & dimisit prædicto *Petro* omnes terras & tenementa cum pertinentiis, quæ habuit sive habere potuit in villis prædictis per successionem hæreditariam de prædicta *Agnete* matre ipsius *Will'i*, tenendum eidem *Petro* ad terminum vitæ ipsius *Petri*; prædictis tenementis, unde Assisa ista

Verdict finding the Release of Infant at 15 by the Custom of Gavelkind.

' ar-

Book II.



‘ arrainata est, in seisinâ prædicti Petri existentibus : Qui quidem *Will'us* postea rediens ad prædicta tenementa factum suum prædictum patriæ notificavit & ratum habuit, &c.’ And thereupon Judgment is given against *William* for his Purparty, though *Peter's* Title to one Moiety as Guardian was then at an End; and as to the other, he had incurred a Forfeiture by Marriage.

Nuper obiit.

The next is *De Gateway's Case*, Mich. 9 Ed. 2. C. B. Rot. 240. Kanc. A *Nuper obiit* brought by *Richard* and *William de Gateway* against *Katbarine de Gateway*, &c. The Pleadings, as to the Purparty of *William*, are already inserted at Length, pag. 56. As to the Purparty of *Richard*, they are as follow :

Bar, that the Demandant released all his Right of Parcenary.

‘ *Katbarina* & aliæ, per *Adam de Byrom* Custodem suum, veniunt, & defendunt Jus suum quando, &c. & quoad partem, quam prædictus *Richardus* filius *Richardi* clamat, &c. dicunt, quòd idem *Richardus* nihil Juris clamare potest in prædictis tenementis, quia dicunt, quòd prædictis tenementis, simul cum aliis tenementis in diversis villis in eodem Comitatu, in seisinâ prædicti *Johannis de Gateway*, patris ipsarum *Katherinæ* & aliarum, existentibus, idem *Richardus* per scriptum suum concessit, remisit, & omnino pro se & hæredibus suis imperpetuum quietum clamavit prædicto *Johanni totum jus & clameum*, quod habuit, vel aliquo modo habere potuit, ratione parcenariæ vel communis successionis post defunctum *Richardi de Gateway*, Patris prædicti
‘ Jo-

‘ *Johannis*, in omnibus terris, tenementis, meſ-
 ‘ ſuagiis, redditibus, boſcis, pratis, paſturis,
 ‘ molendinis, vivariis, cum omnibus eorum
 ‘ pertinentiis, quæ quondam fuerunt dicti *Ri-*
 ‘ *cardi de Gatewayk*, patris prædicti *Johannis*,
 ‘ in *Eſſeche*, *Hertligbe*, *Derteford*, *Otteford*, *Se-*
 ‘ *venok*, *Kemeſinge*, *Sele*, *Kyngſdowne*, & *Ma-*
 ‘ *peleſchaump*, habendum & tenendum omnia
 ‘ prædicta tenementa, &c. prædicto *Johanni*
 ‘ & hæredibus ſuis de capitalibus Dominis
 ‘ feodi impertuum, &c. & proferunt ſcrip-
 ‘ tum illud quod hoc teſtatur, unde petunt
 ‘ judicium, &c.

‘ Et prædictus *Ricardus*, quoad prædictum
 ‘ ſcriptum quietæ clamantiæ, bene cognoscit
 ‘ ſcriptum illud eſſe factum ſuum, ſed dicit,
 ‘ quòd ipſe prætextu ſcripti illius ab actione
 ‘ præcludi non debet, quia dicit, quòd ipſe
 ‘ tempore confectionis prædicti ſcripti fuit
 ‘ infra ætatem; & hoc paratus eſt verificare;
 ‘ &c.

Demandant
 replies, that
 he was under
 Age at the
 Time of the
 Release.

‘ Et *Katherina* & aliæ dicunt, quòd præ-
 ‘ dictus *Ricardus ſecundum Conſuetudinem Kan-*
 ‘ *tia fuit plenæ ætatis* tempore confectionis
 ‘ prædicti ſcripti; dicunt enim, quòd Con-
 ‘ ſuetudo in partibus illis talis eſt, quòd Hæres
 ‘ de Tenurâ de Gavelkynde, cum comple-
 ‘ vit quintum decimum ætatis ſuæ annum,
 ‘ eſt plenæ ætatis ſecundum conſuetudinem
 ‘ illam ad tenementa ſua alienanda, & jus
 ‘ ſuum quietè clamandum, &c. & dicunt,
 ‘ quòd prædictus *Ricardus* tempore confecti-
 ‘ onis ejusdem ſcripti fuit quindecim annorum
 ‘ & amplius; & hoc paratæ ſunt verificare,
 ‘ &c.’

Tenants re-
 join the Cuſ-
 tom of Kent,
 to be of full
 Age at 15 as
 to aliening
 Gavelkind
 Lands, and
 releaſing his
 Right;
 and that the
 Demandant
 was 15 when
 he releaſed.

P

‘ Et

Of Alienation by an Infant.

Book II.

The Deman-
dant takes
Issue on the
Custom.

‘ Et *Ricardus* dicit, quòd Consuetudo, quam
‘ prædicta *Katherina* & aliæ allegant, non est
‘ talis in partibus prædictis; dicit enim, quod
‘ ad hoc, quòd alienatio sive quietè claman-
‘ cia alicujus de tenementis, quæ sunt de
‘ tenurâ de *Gavelykynde*, ipsum præcludere
‘ debent, requiritur quòd ipse tempore alie-
‘ nationis seu *quietè clamancie* hujusmodi sit
‘ ætatis viginti & unius annorum plenè
‘ completorum, & non infra ætatem illam,
‘ viz. statim post quintum decimum an-
‘ num completum, sicut prædicta *Katherina*
‘ & aliæ dicunt; & hoc petit quòd inquiratur
‘ per patriam, &c. Et *Katherina* & aliæ
‘ similiter.

Verdict that
one of the
Age of 15
may give and
release Gavel-
kind Lands,
and that the
Demandant
released at
that Age.

‘ Postea *Juratores*, de consensu partium
‘ electi, venerunt, & dicunt super sacramen-
‘ tum suum, quòd prædictus *Ricardus* tem-
‘ pore Confectionis prædicti scripti *quietè-*
‘ *clamancie*, quod prædictæ *Katherina*, *Marg.*
‘ & *Eliz.* proferunt sub nomine ipsius *Ri-*
‘ *cardi*, fuit ætatis quindecim annorum &
‘ amplius, & quòd *Quilibet ætatis quindecim*
‘ *annorum de tenurâ de Gavelykynde potest tene-*
‘ *menta sua dare, & quietè-clamantiam imper-*
‘ *petuum inde facere, secundum consuetudinem*
‘ *tenuræ illius, &c.*

Judgment ac-
cordingly for
the Tenants.

‘ Ideò *Consideratum* est, quòd prædictus *Ri-*
‘ *cardus*, quoad propartem suam ipsum con-
‘ tingentem de tenementis prædictis, nil ca-
‘ piat per Juratam istam, sed sit in mîa pro
‘ falso clamore, &c.

* * *Plac. Ass. in Com. Kanc. 47 Ed. 3.* Chap. III.

* *Assisa venit recognitura si Johannes Wisdom* Assize.

* & *Isabella* Uxor ejus injustè & sine judicio
 * disseisiverunt *Simonem Parlebien* de libero
 * tenemento suo in *Ketebrok* & *Eltham* post
 * primam, &c. Et unde queritur de duode-
 * cim acris terræ, & dimidio acræ prati cum
 * pertinentiis, &c.

* Et *Johannes* & *Isabella* in propriis per-
 * sonis suis veniunt, & respondent ut tenentes
 * tenementorum prædictorum, & dicunt, quod
 * prædictus *Simon* Assisam inde versus eos ha-
 * bere non debet, quia dicunt, quòd idem
 * *Simon* per quoddam scriptum suum, quod
 * proferunt hîc in Curiâ, cujus data est die
 * Lunæ prox. post festum Purificationis Beatæ The Tenants
 * Mariæ anno Regni Regis nunc Angliæ 35°. plead the Re-
 * remisit & quietum clamavit eidem *Johanni* lease of the
 * *Wisdom* totum jus suum, quod habuit in Plaintiff,
 * tenementis prædictis; & petunt judicium
 * si idem *Simon* Assisam inde versus eos con-
 * tra scriptum suum prædictum habere de-
 * beat, &c.

* Et prædictus *Simon*, non cognoscendo Who replies,
 * scriptum prædictum, dicit quod ipse ab that he was
 * Assisâ in hac parte habendâ excludi non under Age at
 * debet, quia dicit, quòd ipse tempore con- the Time.
 * sectionis scripti prædicti fuit infra ætatem,
 * &c. & hoc petit quòd inquiratur per Assi-
 * sam, &c.

* N. B. The Rolls of the Records before the Justices of Assize are seldom numbred, but the Bundles are generally small.

Of Alienation by an Infant.

Book II.
 Tenants re-join, that the Plaintiff was 15, and by the Custom of Gavelkind may release at that Age.

‘Et prædicti *Johannes & Isabella* dicunt, quòd tenementa prædicta sunt *Gavelkyndesia*, & dicunt, quòd *usus Gavelkynd talis est, quòd quilibet homo ætatis quindecim annorum potest terras & tenementa sua dare & alienare, remittere & relaxare cuicumq; voluerit, a toto tempore in Com. Kanc. usitatus.* Et dicunt, quod tempore confectionis scripti prædicti dictus *Simon* fuit ætatis quindecim annorum, ita quòd tunc remittere & relaxare potuit jus suum de tenementis prædictis in formâ prædictâ; & hoc parati sunt verificare per Assisam, &c.

Plaintiff sur-rejoins, that he was under 15.

‘Et prædictus *Simon* dicit, quòd ipse, tempore confectionis scripti prædicti, non fuit ætatis quindecim annorum; & hoc paratus est verificare per Assisam, &c. Et prædicti *Johannes & Isabella* similiter, Ideò capiatur inde inter eos Assisa, &c.

Verdict, that he was upwards of 15.

‘*Recognitores* veniunt, qui ex consensu paritum ad hoc electi & jurati dicunt super sacramentum suum, quod prædictus *Simon* tempore confectionis scripti prædicti fuit ætatis quindecim annorum, & amplius. Ideo Consideratum est quod prædictus *Simon* nichil capiat per Assisam istam, sed sit in mîa pro falso clamore suo, &c. Et prædicti *Johannes & Isabella* inde sine die.’

Assize.

Aff. in Com. Kanc. 7. Ed. 3. Rot. 2.
 An Assize brought before former Justices of Assize, by *Richard de Bourne* and *Joan* his Wife, against *John*, Son of *Thomas de Hegbam* and others, for a large Quantity of Lands in *Littlebourne, Stoddemershoe, Chibcelet,*

celet, Reculvre, & Menstre in insulâ de *Ta-* Chap. III.
neto.

John de Hegham pleads, ' *Quòd tenementa* Bar, that the
' *funt de tenorâ de Gavelkynde, & dicit quod* Tenant's Fa-
' *prædictus Thomas* pater suus obiit seifitus de ther died
' *eisdem tenementis in dominico suo, ut de* seifed, and his
' *Feodo & jure; post cujus mortem prædicta* afterwards
' *Jobanna, quæ nunc queritur simul, &c. ut* seifed of the
' *ipsa, quæ fuit uxor prædicti Thomæ, post* Lands as
' *mortem ipsius Thomæ seifivit prædicta te-* Guardian in
' *nementa, secundum Usam de Gavelkynde,* Gavelkind,
' *ratione Nutrituræ* ipsius *Jobannis filii & hæ-* and the Te-
' *redis ipsius Thomæ, & ea optinuit per Usa-* nant entred
' *gium prædictum, usq; ad ætatem prædicti* on her at 15.
' *Jobannis filii Thomæ quindecim annorum; post*
' *quod tempus idem Johannes filius Thomæ,*
' *ut ipse qui plenæ ætatis fuit per Usagium*
' *prædictum, intravit prædicta tenementa ut*
' *hæreditatem suam; & sic tenet ipse tene-*
' *menta illa; & petit judicium, si prædicti*
' *Ricardus & Jobanna* de hujusmodi possessione
' *prædictæ Jobannæ, ratione nutrituræ præ-*
' *dictæ, ut prædicatur, Assisam, &c.*

' *Et prædicti Ricardus & Jobanna non de-* Plaintiffs re-
' *dicunt quin eadem Jobanna habuit Nutri-* ply a Release
' *turam prædicti Jobannis filii Thomæ, seu* by the Te-
' *quin tenuit prædicta tenementa ratione* nant at 15 to
' *Nutrituræ per usagium, sicut prædictum* his Mother,
' *est, sed dicunt; quòd ipsi eâ de causâ ab* the Lands be-
' *assisâ suâ repelli non debent, dicunt enim,* ing Gavel-
' *quòd prædictis tenementis in * seifinâ ejus-* kind.
' *dem*

* If a Guardian, after the full Age of the Heir, continues in Possession against the Will of the Heir, the Law

Book II.

The Tenant
rejoins, that
he was under
15 at the
Time of the
Release.

dem Johannæ existentibus, prædictus Johannes
filius Thomæ, post ætatem suam quindecim an-
norum, ut ille, qui plenæ ætatis fuit secundum
usum de Gavelkynde, remisit, dimisit, & re-
laxavit eidem Johannæ totum Jus & Clameum
suum, quod habuit in eisdem Tenementis;
& proferunt inde quoddam scriptum hîc in
Curiâ sub nomine prædicti Johannis filii
Thomæ, quod idem testatur in hæc verba:
Universis scriptum hoc visuris, vel audi-
turis, Johannes filius Thomæ de Hegham Sa-
lutem in Domino sempiternam. Noveritis
me in purâ & legitimâ ætate dimisisse, con-
cessisse, & imperpetuum quietum-clamâsse,
pro me & hæredibus meis, Johannæ de Heg-
ham matri meæ, & hæredibus suis, totum
Jus meum & Clameum, quod habui, vel
aliquo modo habere potero in futuro, in
omnibus & singulis tenementis meis ubi-
cunq; in Com. Kanc. existentibus, &c.
& Et prædictus Johannes filius Thomæ non
dedit prædictum esse factum suum, sed di-
cit, quod scriptum illud ei nocere non debet,
dicit enim, quod tempore confectionis scripti
illius fuit infra ætatem quindecim annorum;
& de hoc se ponit super patriam, & præ-
dicti Ricardus & Jobanna similiter, &c.
Which Plea is an Admission of the Custom.
And this Record being sent down to the pre-

looks upon him as an Abator, *Co. Litt.* 57. b. if with the
Consent of the Heir, he is Tenant at Will: In either
Case he is capable of accepting a Release; in the first,
because he has a Freehold; in the second, by Reason of
the Privity.

sent

sent Justices of Assize, 'Coram præfatis Justiciariis prædicti *Ricardus & Johanna* uxor ejus veniunt, & prædictus *Johannes* filius *Thomæ* non venit ad manutenendum placitum, quod aliàs placitavit, &c. sed *Will'us* de *Waure* respondet pro eo, quàm pro aliis, tanquam eorum Ballivus, & dicit, quòd nullam injuriam inde fecerunt seu disseisinam, & de hoc se ponunt super Assisam, &c.' And the Jury find for the Plaintiffs; which, it seems, they could not have done, had not the Right passed from the Tenant to the Plaintiff *Joan* by this Release; for otherwise the Tenant's Entry had been lawful, and no Disseisin. And on that Verdict there is Judgment for the Plaintiffs.

Chap. III.

And afterwards repleads Null Disseisin, &c.

Verdict, and Judgment for the Plaintiffs.

Aff. in Com. Kanc. 2 Ric. 2. Assisa venit recognitura si *Johannes Marchall* de *Rouchestre*, & *Johanna* Uxor ejus, injustè, &c. disseisiverunt *Alianoræ* *Spicer* de *Rouchestre* de libero tenemento suo in *Rouchestre*, post primam, &c. Et unde queritur, quòd disseisiverunt eam de duobus Messuagiis cum pertinentiis, &c.

'Et prædicti *Johannes & Johanna* in propriis personis suis veniunt, & respondent ut tenentes tenementorum in visu positum, & dicunt, quòd Assisa inde inter eos fieri non debet, quia dicunt, quod tenementis prædictis, quæ sunt de tenurâ de *Gavelkynd*, in seisinâ ipsius *Johannæ*, dum sola fuit, existentibus, præfata *Alianora* plenæ ætatis existens secundum Consuetudinem de *Gavelkynd*, viz. de ætate quindecim annorum & amplius, per quodam scriptum suum, quod hîc in Curia proferunt,

The Tenants plead in Bar, a Release by the Plaintiff at her Age of 15, the Tenements being Gavelkind.

Book II.

ferunt, cujus data est apud *Roucheestre*, &c.
 per nomen *Alianoræ*, filiæ *Roberti Spicer* de
Roucheestre, remisit, relaxavit, & omnino de se
 & hæredibus suis imperpetuum quietum cla-
 mavit eidem *Johannæ*, per nomen *Johannæ*,
 quæ fuit uxor *Roberti Spicer* patris ipsius
Alianoræ, & hæredibus suis totum Jus & Cla-
 meum, quæ habuit in Messuagiis prædictis, per
 nomina duorum messuagiorum, situatorum
 in Civitate *Roffensi*, unde unum Messuagium,
 vocatum *Swan atte Hope*, situatur inter Mes-
 suagium *Johannis de Barton* versus *East*, &
 Messuagium *Benedicti Ryx* versus *West*; &
 aliud Messuagium situm est inter Messua-
 gium quondam *Emmæ Godwyne* versus *East*,
 & Messuagium *Roberti Bridbrok* versus
West, & prædictum Messuagium vocatur
Cbeke atte *Hope*; & ulterius obligavit se,
 & hæredes suos, ad Warrantizandum eidem
Johannæ, hæredibus & assignatis suis,
 messuagia prædicta cum pertinentiis im-
 perpetuum; unde petunt judicium, si
 eadem *Alianora* contra scriptum suum præ-
 dictum, & quod *Warrantiam* in se con-
 tinet, Assisam de tenementis prædictis
 versus eos habere seu manutenere debeat,
 &c.

Plaintiff re-
 plies, that the
 Release was
 made thro'
 Durefs of Im-
 prisonment,
 &c.

Et prædicta *Alianora* dicit, quod ipsa
 virtute scripti prædicti, seu *Warrantie* in
 eadem contentæ, ab Assisâ de tenementis
 prædictis habendâ præcludi non debet,
 quia dicit, quod tempore confectio-
 nis scripti illius ipsa fuit imprisonata in quâ-
 dam Camerâ in Villâ prædictâ per præ-
 dictam *Johannam*, & in eadem detenta,
 &

‘ & ulterius eadem *Johanna* ipsi *Alianora*
 ‘ comminata fuit, quod non comederet, nec
 ‘ biberet, nec exiret abinde, donec eidem
 ‘ *Johanna* concedere vellet ad faciendum &
 ‘ sigillandum scriptum prædictum; & sic
 ‘ dicit, quod ipsa per hujusmodi duritiam,
 ‘ imprisonamentum, metum minarum præ-
 ‘ dictarum, ac coercionem, fecit eidem
 ‘ *Johannæ* scriptum prædictum; & hoc pa-
 ‘ rata est verificare, unde petit judicium,
 ‘ &c.

‘ Et prædicti *Johannes* & *Johanna* di- Issue joined
 ‘ cunt, quòd tempore confectiois scripti on the Du-
 ‘ prædicti præfata *Alianora* fuit sui juris ad refs.
 ‘ largum, & extra quamlibet prisonam, &
 ‘ scriptum illud ex mera & spontaneâ volun-
 ‘ tate suâ fecit, & non per duritiam impri-
 ‘ sonamenti, metum minarum, aut per co-
 ‘ hercionem; & de hoc se ponunt super Af-
 ‘ fissam, & prædicta *Alianora* similiter. Ideo
 ‘ capiatur inde Assisa.

‘ *Recognitores* veniunt, qui de consensu Verdict, that
 ‘ prædictorum *Alianoræ*, *Johannis* & *Johannæ* she was at
 ‘ ad hoc electi, triati, & jurati dicunt super large, &c.
 ‘ sacramentum suum, quòd tempore con-
 ‘ fectiois scripti prædicti præfata *Alianora*
 ‘ fuit sui Juris, ad largum, & extra quam-
 ‘ libet prisonam, & scriptum illud ex merâ
 ‘ & spontaneâ voluntate suâ fecit, prout
 ‘ prædicti *Johannes* & *Johanna* placitando
 ‘ allegaverunt, & non per duritiam impri-
 ‘ sonamenti, metum minarum, seu per co-
 ‘ hercionem, prout prædicta *Alianora* asse-
 ‘ ruit. Ideo *Consideratum* est quod eadem Judgment for
 ‘ *Alianora* nihil capiat per Assisam istam, the Tenants,
 ‘ sed



Verdict find-
ing the Re-
lease of the
Heir in Ga-
velkind.

‘ sed sit in mīa pro falso clamore suo, & præ-
‘ dicti *Johannes & Johanna* eant inde sine die,
‘ &c.

Aff. in Com. Kanc. 4 Ric. 2. in iisd. Rot.
An Affise brought by *Henry Aleyn* and *Agnes*
his Wife, against *William de Echyngbamme*
Knight, and others, for Lands in *Cranebroke*.
On *Nul Disseisin* pleaded, the Jury find
specially (amongst other Things) that,
‘ prædictis *Henrico & Agnete* in feisinâ me-
‘ dietatis messuagii & terræ existentibus,
‘ &c. Quidam *Galsfridus Nettere* filius *Gal-*
‘ *fridi Nettere*, per quoddam scriptum su-
‘ um, iisdem Recognitoribus in evidentiam
‘ liberatum, (quod sequitur in hæc verba,
‘ Noverint universi per præsentem me *Galsfri-*
‘ *dum Nettere*, filium *Galsfridi Nettere* de pa-
‘ rochiâ de *Cranebroke*, concessisse, relaxasse &
‘ imperpetuum pro me & hæredibus meis
‘ quietum-clamasse *Henrico Aleyn*, & *Agneti*
‘ uxori ejus, de eâdem Parochiâ, totum *Jus*
‘ & clameum, quod habeo, seu de cætero
‘ habere potero, in medietate cujusdam mes-
‘ suagii cum suis pertinentiis, unâ cum me-
‘ dietate de duabus peciis terræ cum suis perti-
‘ nentiis; quam quidem medietatem prædicti
‘ messuagii, unâ cum medietate dictarum pe-
‘ ciarum terræ, prædicta *Agnes* habuit ex do-
‘ no prædicti *Galsfridi* patris mei, & dictum
‘ messuagium cum pertinentiis scituatum est,
‘ &c.) concessit & * [*remisit*] imperpetuum præ-
‘ fato *Henrico*, & *Agneti*, & eorum hære-

* The Roll is obliterated in this Place.

‘ dibus

‘ *dibus & assignatis, totum Jus & Clameum,* Chap. III.
‘ *quæ habuit in prædictâ medietate* * [*Messuagii*]
‘ *& terræ prædictorum, &c. in seisinâ eorundem*
‘ *Henrici & Agnetis adtunc existente. Recog-*
‘ *nitores quæsitî sî terra prædicta sit de te-*
‘ *nurâ de Gavelkynde, necne, & cujus æta-*
‘ *tis præfatus Galfridus filius Galfridi existit*
‘ *tempore confectiõis scripti prædicti, præ-*
‘ *fatis Henrico & Agneti facti, &c. dicunt super*
‘ *sacramentum suum, quod prædicta* [* *terra*
‘ *est de] tenurâ de Gavelkynde, & quidd tem-*
‘ *pore confectiõis scripti prædicti præfatus*
‘ *Galfridus filius Galfridi fuit circiter ætatem* When about
‘ *decem & septem annorum, &c.*’ And Judg- seventeen.
ment is given for the Plaintiffs *Henry and Ag-* Judgment a-
nes for that Moiety. gainst the
Heir.

Aff. in Com. Kanc. 4 Ric. 2. An Affise of
Novel Disseisin, brought by *John de Twytham*
and *Maud* his Wife against *John Feversham* In Affize.
and *Sarab* his Wife, for Lands in *Nonington*,
&c.

The Tenants, as to Part of the Premisses, Release of an
plead, that ‘ *Ricardus Kempe de Brabourne,* Infant at 15
‘ &c. dedit *Johanni Akholt & Saræ,* tenendum of Gavelkind
‘ *eis & hæredibus prædicti Johannis Akholt* Lands plead-
‘ *imperpetuum; & de ipsis Johanne Akholt &* ed.
‘ *Saræ exivit quidam Edwardus Akholt, ut*
‘ *filius & hæres eorundem, & postea præ-*
‘ *dictus Johannes Akholt obiit, post cujus*
‘ *mortem tenementis prædictis in seisinâ præ-*
‘ *fate Saræ existentibus, præfatus Edwardus,*
‘ *filius & hæres ejusdem Johannis Akholt de*
‘ *ætate quindecim annorum & amplius, per*

* The Roll is obliterated in these Places.

‘ *quod-*

Book II.



‘ *quoddam scriptam suum, quod hîc in ‘Cu-
 ‘ ria proferunt, remisit & relaxavit eidem Saræ,
 ‘ & hæredibus ac assignatis suis imperpetuum,
 ‘ totum Jus & Clameum, quæ habuit in om-
 ‘ nibus tenementis prædictis; quæ quidem
 ‘ tenementa sunt de tenurâ de Gavelkynde;
 ‘ quæ quidem Sara cepit in virum ipsum
 ‘ Johannem Feversham, &c.’ And neither the
 Release nor the Custom are denied by the
 Plaintiffs.*

Assize.

Ass. in Com. Kanc. 4 Ric. 2. An Assize brought by *John Croke* and *Dionise* his Wife, against *John Bolle* and *Alice* his Wife, for Lands in *Sesaltre*.

The Tenants plead, that *Nicholas de Clyndene*, Father of the Plaintiff *Dionise*, being seised in Fee, devised them, according to the Custom of the Borough, to his Wife; *Alice* for Life, who afterwards married *Bolle*;

Plea of Re-
 lease on Con-
 firmation by
 the Plaintiff
 at 15, by the
 Custom of
 Gavelkind.

‘ *Et postea tenementis illis sic in seisinâ eorun-
 ‘ dem Johannis Bolle & Aliciæ existentibus, præ-
 ‘ fata Dionisia de ætate quindecim annorum &
 ‘ amplius existens, per nomen Dionisiæ, &c.
 ‘ per quandam cartam suam, quam hîc in
 ‘ Curia proferunt, &c. concessit & confirma-
 ‘ vit eidem Johanni Bolle & Aliciæ uxori, &
 ‘ eorum hæredibus ac assignatis, omnia præ-
 ‘ dicta tenementa cum pertinentiis imperpe-
 ‘ tuum, per nomen, &c. quæ omnia tene-
 ‘ menta sunt de tenurâ de Gavelkynde; &
 ‘ ulterius obligavit se & hæredes suos ad War-
 ‘ rantiam, &c.’ and therefore pray Judgment
*si contra scriptum suum, &c.**

The Plaintiffs reply, ‘ *Quòd ipsa Dionisia est infra ætatem, per quod ipsi cartam
 ‘ illam*

‘ illam cognoscere vel dedicere, vel ad illam
 ‘ respondere non possunt, nec per legem terræ
 ‘ compelli debeant, & petunt Assisam: Et
 ‘ pro eo quòd eadem *Dionisia* infra ætatem
 ‘ est, the Assise is awarded to be taken at
 ‘ large; Et præceptum est Vic. quod venire
 ‘ faciat coram præfatis Justiciariis *Thomam*
 ‘ *Spriget*, &c. testes in prædictâ cartâ nomi-
 ‘ natos, ad recognoscendum simul, &c.’—
 Which shews, that the Court looked upon
 the Execution of the Deed to be the Matter
 in Dispute.

*Ass. in Com. Kanc. 12 Ric. 2. An Assise of
 Novel Disseisin, by Thomas de Wormesell, Ro-
 bert Brockman, and others, against John Kel-
 sham, for Lands in Newenton near Sydyng-
 bourne.*

The Tenant pleads in Bar, that the Te-
 nements ‘ sunt de Tenurâ Gavelkynde; &
 ‘ dicit, quod habetur ibidem talis Consue-
 ‘ tudo, quòd quilibet tenens aliquorum tene-
 ‘ mentorum, quæ sunt de tenurâ de Gavel-
 ‘ kynde, tenementa illa, cum fuerit ætatis
 ‘ quindecim annorum, dare possit & alienare,
 ‘ & totum jus suum remittere & relaxare ad
 ‘ voluntatem suam, juxta Consuetudinem
 ‘ Comitatus prædicti;’ and that one *Thomas*
de Wornedale being seised in Fee of the Pre-
 misses, & *infra ætatem quindecim annorum*,
 made a Feoffment in Fee thereof to one
Adam Elys. and afterwards died, leaving one
Maud his Sister and Heir, (under whom the
 Plaintiffs claim) who being ‘ ætatis quin-
 ‘ cim annorum & amplius, viz. ætatis de-
 ‘ cem & septem annorum, per nomen *Ma-
 ‘ tilda*

Plea of the
 Custom of
 Gavelkind to
 alien and re-
 lease, &c.
 and of a Re-
 lease of the
 Lands, when
 above 15, to
 one having
 before a de-
 feasible Estate.
 under the
 Feoffment of
 an Infant un-
 der 15.

Book II.



‘ *Matildæ filiæ Richardi de Wornedale*, per quoddam scriptum suum, quod hîc in Curia profert, cujus data est, &c. *remisit & relaxavit*, & omnino de se & hæredibus suis imperpetuum quietum clamavit præfatus *Adæ* & ipsi *Johanni Kelsbam* totum *Jus suum* & *Clameum*, quæ habuit, vel aliquo modo habere potuit in tenementis prædictis cum pertinentiis, &c. prædicto *Johanne Kelsbam* in possessione prædictorum tenementorum adtunc existente, &c.’

Reply *Non est factum*.

The Plaintiffs reply, that the release *non est factum prædictæ* Matildæ: Which puts in Issue neither the Custom, nor the Infancy, but the Execution of the Deed only. And upon this Issue was joined, &c.

Assize.

Aff. in Com. Kanc. 13 Ric. 2. An Assise brought by *Peter Hamon*, and *Isabel* his Wife, against *John Wardon* the Elder, for Lands in *Egerton*, &c.

Plea of Custom of Gavelkind for Women at 15 to alien, &c.

The Tenant pleads in Bar, ‘ Quod tenementa in visu posita tenentur secundum Consuetudinem de *Gavelkynd*; & dicit quod per Consuetudinem de *Gavelkynd* Mulieres, quæ sunt inde tenentes, cum ætatis quindecim annorum fuerint, tenementa illa alienare possunt; & dicit quod prædicta *Isabella*, per nomen *Isabellæ Brestcombe*, dum sola fuit, & ætatis quindecim annorum & amplius, per quoddam scriptum suum, quod hîc in Curia profert, &c. cujus data est, &c. *remisit & relaxavit*, & omnino de se & hæredibus suis imperpetuum quietum clamavit eidem *Johanni Wardon*, se
‘ niori,

Release by one of that Age.

‘ niori, per nomen *Johannis Wargedon*, &
 ‘ *Agneti* tunc uxori ejus, *adtunc tenentibus*
 ‘ *tenementorum* prædictorum, & hæredibus ip-
 ‘ sius *Johannis Wardon* senioris, *totum Jus &*
 ‘ *Clameum*, quod habuit, seu quovismodo ha-
 ‘ bere potuit in tenementis prædictis, per
 ‘ nomen omnium terrarum & tenementor-
 ‘ um, quæ quondam fuerunt *Rogeri de*
 ‘ *Brestcombe* patris s. i, & obligavit se & hæ-
 ‘ redes suos ad *Warrantiam*, &c. unde pe-
 ‘ tit Judicium, &c.’ The Plaintiffs reply
non est factum, and at the Day of Trial are
 Nonsuit.

Though these Authorities may be sufficient to prove, that the Custom has been an-
 ciently so understood, that an Infant of 15 may release the Fee to his Guardian hold-
 ing over, or to Tenant for Life, or a mere Right to one that has a defeasible Estate, who have Seisin already; yet it is a Question of a very different Consideration, whether he may grant a present Estate in the Land by any other Means, than that of Livery: None of these Instances amount to this; and the only Cases, that favour such an Opinion, are those already mentioned, which speak in general Terms of the Custom, as giving Power to *alien*; and such others as say, that the Infant is by the Custom of Gavelkind of * *full Age* at 15: To which may

Whether the Custom extends to other Conveyances.

* Note, That the *full Age* of Male and Female, according to common Parlace, is the Age of 21 Years.
Litt. Sec. 104.

Book II.



be added the usual Manner of pleading the general Issue in a *Dum fuit infra etatem* for Gavelkind Lands:

Itin. Kanc. 55 H. 3. Rot. 90. in dorso. Dum fuit infra etatem, by William Peterson, against Philip de Knolle, who pleads, that the Demandant ‘*fuit plenæ etatis quando dimisit*, scil. *ætatis quindecim annorum secundum Consuetudinem Gavelikindorum. Juratores dicunt, &c. quòd prædictus Willus fuit plenæ etatis quindecim annorum secundum Consuetudinem de Gavelikinde, quando dimisit, &c.*’ And the like pleading occurs in *Eod. Itin. Rot. 14 & 25. Itin. Kanc. 7 Ed. 1. Rot. 47. Rex Roll. Trin. 12 Ed. 1. C. B. Rot. 68. Itin. Kanc. 21 Ed. 1. Berewicke Rot. 4. Itin. Kanc. 6 Ed. 2. Rot. 3.* This general Method of pleading, that he being of full Age, &c. conveyed, without specifying the Kind of Conveyance, is some sort of Evidence, that the Custom extends to all Manner of Alienations.

But as this Custom is not of a Kind to be favoured or extended, and a Feoffment was the Conveyance most used at Common Law, and being the most publick and notorious Method of Alienation, is fittest in the Case of an Infant, where there may be Suspicion of Fraud or Imposition; I believe no prudent Person would advise to try the Experiment of any other Conveyance, where a Feoffment may possibly be had.

Whether a
Warranty on
a Feoffment
within the Custom be good,

A Warranty on a Feoffment within the Custom is said to be void, the Custom not

extending

extending to it. 11 H. 4. 33. But see before, 198, 212, 214. Chap. III.

2. It is said in some of the Books, that the Custom warrants no Alienation, but upon a Sale. 21 Ed. 4. 24. Old Bendl. 7. New Bendl. 33. by Hales Serjeant. For a full and sufficient Recompence. Lamb. $\frac{622}{361}$, $\frac{627}{373}$, 566. Noy's Max. 40. For the Words of the *Custumal* are *doner & vender*, Lamb. *ibid.* And those of 55 H. 2. Rot. 5. Ante 194. are *dare, vendere*. But the other two Copies of the *Custumal* read *doner ou vender* in the Disjunctive: Nor can I find any Instance on Record, wherein the Consideration for the Feoffment is set out, as probably it would be, were it necessary; but the common Way of pleading is, *quod dedit & concessit*, &c. or sometimes, *quod feoffavit*, &c. or *dimisit*, or *remisit & relaxavit*, as in the Instances before.

3. Some have said, that the Infant must have the Lands by Descent, and not by Purchase, for the Words of the *Custumal*, *Ceux Heirs*, do not include Purchasers. Lamb. $\frac{627}{373}$, 566. O. Bendl. 7. N. Bendl. 33. by Hales Serjeant, who was a Kentish Man. So is the Language of Mich. 11 Ed. 3. B. R. Rot. 133. and Mich. 20 R. 2. B. R. Rot. 62. that *Heredes de Gavelykynde possunt alienare*, &c. For this Reason, it is said, that the Custom extends not to empower him to alien Lands given him by Will. Noy's Max. 40. But the Conclusion is somewhat too hastily drawn; for the Words of other Records are more general,

Q

Book II.

general, as that *Quilibet tenens, &c.* as in 55 H. 3. *Itin. Kanc. Rot. 5. Ante 194. Mich. 9 Ed. 2. C. B. Rot. 240. Ante 202. Aff. in Com. Kanc. 47 Ed. 3. Ante 204. & Aff. in Com. Kanc. 12 Ric. 2. Ante 213.* And likewise among the same Records of the same Year in *Mich. Pour's Case*, it is pleaded, ' *Quòd habetur Talis Consuetudo in Comitatu prædicto, quod quilibet tenens terrarum & tenementorum, quæ sunt de tenurâ de Gavelkynd, tenementa illa, cum ætatis quindecim annorum fuerit, in feodo alienare potest;*' and a Feoffment accordingly. And in *Trin. 12 Ed. 1. C. B. Rot. 68. Kanc.* In a *Dum fuit infra ætatem*, and Issue joined, whether the Plaintiff were of full Age; the Jury find, *quod fuit quindecim annorum, quando dimisit, &c. Requisiti quantæ ætatis homo debet esse, qui tenet in Gavelikende, qui possit alium feoffare, per quod stabile sit Feoffmentum suum, dicunt quod quindecim annorum.*

The Infant cannot by Feoffment discontinue Lands entail-
ed.

4. He must be seised in Fee. An Infant above the Age of fifteen Years made a Feoffment of Lands in Gavelkind whereof he was Tenant in Tail; the Court held clearly, that this Feoffment is no Discontinuance, nor shall bind the Infant; for the Custom shall never enable him to do a *Tort*, and therefore shall be taken to extend only to Land whereof he is seised in Fee. *Vaughan and Holdes, Cro. Jac. 80.*

It seems that an Infant may, within the Custom, make a Lease for Life or Gift in Tail by Livery *propria manu*: For a Custom to grant Lands in Fee-simple *à fortiori* extends to granting them for a lesser Estate. *Co. Copyb. Sect. 33. Co. Litt. 52. b. Cro. Eliz. 373.* Chap. III.
Whether Gift in Tail, or for Life by Livery be within the Custom.

Nay, if a Custom be to grant in Fee, & *non aliter*, yet he may grant for Life; or to *A.* for Life, Remainder to *B.* in Tail. *Salk. 189. per Holt.*

If an Infant of Fifteen, where there is a Custom for Persons of that Age to make a Feoffment, should grant to the King by Deed inrolled, and afterwards a Statute should be made confirming all Grants to the King before that Time, yet this Statute would not make it good; for where an Act is good by Custom, if that be not pursued, it is all one as if there were no Custom: And the Statute never meant to enable those Persons or their Grants, who by natural Defects or Disabilities were either by the Law of Nature or the Law of the Land disabled to grant. *Hob. 224, 225.* Grant to the King by Deed inrolled.

In Assize the Tenant pleads in Bar the Feoffment of *J. S.* the Plaintiff replies, that *J. S.* at the Time of the Feoffment was under Age, &c. the Tenant rejoins, that there is a Custom in the Place, that any one of the Age of fifteen Years may make a Feoffment. And this was held no Departure, for the Force of the Bar is the Feoffment, and the Matter in the Rejoinder is to prove the Feoffment good, so that it is only an Inforcement of the Bar. *21 H. 7. 17. b.* How this Feoffment may be pleaded.



ing, on the same Custom in 32 *Aff. pl. 4.* and in *Mich. 9 Ed. 2. C. B. Rot. 240. Ante 200. & Plac. Aff. 47 Ed. 3. Simon Parlebien's Case, ante 203.* and no Exception taken to it. But however reasonable this Opinion may seem, the more adviseable Way is to set out the Custom in the first Instance; for it is laid down as a general Rule in *Co. Litt. 304. a.* that when a Man in his former Plea entitles himself generally by the Common Law, in his second Plea he shall not enable himself by a Custom, but should have pleaded it at first. And this is supported by 37 *H. 6. 5. a. Keilw. 75. b.* Abbot of *Bukefast's Case.* And *Yelv. 14. Wood and Hawkshhead*, where the very Case before is put by the Court: If a Man intitles himself by Feoffment of one *A.* and the other shews that *A.* was an Infant at the Time of the Feoffment, if the Plaintiff introduce a Custom to make the Feoffment good, it is a Departure, for the Custom is a Matter of Title. But see *Godb. 122.* Covenant brought on an Indenture of Apprenticeship, the Apprentice pleaded Infancy, the Plaintiff replied the Custom of *London* for an Infant to bind himself Apprentice. *Wray Ch. Just.* held it no Departure. But this afterwards coming in Question in the Case of *Walker and Nicholson, Cro. Eliz. 652.* the Court doubted concerning it. And in the Case of *Mole and Wallis*, reported 1 *Lev. 81. Raym. 60. 1 Sid. 142. 1 Keb. 376, 469, 512.* the Court were divided in Opinion on the like Question,

Question, two Judges holding it a Departure, and Two that it was not. Chap. III.

Where an Infant, impleaded in a *Præcipe* Of Age.

for Gavelkind Lands of his Ancestor, has prayed, that the Parol might demur till Twenty-one, it has often been endeavoured to oust him of his Age by Pleading that the Lands are Gavelkind, and the Infant above the Age of fifteen Years, and that the Custom is, that when the Heir is of the Age of Fifteen, he shall have his Lands, and may alien them, and therefore ought to answer immediately; but the Court has held this not to be a good Counterplea, for though by this Custom he is of Ability to alien his Land at that Age, yet he is under Age as to other Respects, and they must adjudge his Age according to the Law of the Land. 9 Ed. 3. 38. Hil. 31 Ed. 3. Age 53. 39 Ed. 3. 19. 11 H. 4. 29. 16 Ed. 2. Mayn. 478. And the same Thing is affirmed in *Dyer* 262.

But as the first of these Authorities seems to acknowledge, that if it could be found, that the Usage had been otherwise allowed in this particular, it would vary the Case; I shall cite a Record to shew, that by the Custom of *Kent*, an Infant of fifteen Years is of Age as to this Purpose, as well as to that of Alienation.

Itin. Kanc. 39 H. 3. Rot. 1. in dorso. A Writ of Entry *sur Disseisin* brought by *Tho.* Son of *Thomas le Muner*, against *Thomas Edward*, and others, for the Moiety of a Mill, &c. in *Erchele*. ' *Thomas Edward*

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Lands in *Glocester, Pasch. 13 Ed. 3. Fitzb. Dum fuit infra etatem, 3.*

And accordingly Lord *Hobart* says, that in Pleading a Feoffment by an Infant, a certain Age must be set down, that the Court may judge it an Age of Discretion, and it must not be left upon telling twelve Pence, or measuring a Yard of Cloth, for Custom cannot abrogate the Law of Nature. *Hob.*

225.

But this Custom, tho' not to be supported at present, seems to have had its Foundation in the old Common Law, for this was the Age when the Son was out of Ward as to Burgage Lands: 'Si autem fuerit filius Burgensis, tunc ætatem habere intelligitur, cum denarios discretè sciverit numerare, pannos ulnare, & alia negotia similia paterna exercere; & sic non definitur certum tempus, sed per sensum & maturitatem suam.' *Bract. Lib. 7. c. 37. f. 86. b. Glanv. Lib. 7. c. 9.* The Reason of the Law indeed was soon so much altered in this Respect, that the Judges in 19 *Ed. 2.* disallowed even the Custom of a Borough to be out of Ward at that Age. In a Writ of Ravishment of Ward, the Defendant pleaded the Usage of *Ipswich*, that when the Infant was of Age to count and measure, he was of full Age to marry himself, and to have his Land; and avers, that the Infant was of the Age of twelve Years, and could count and measure. But as the Defendant had acknowledged, that the Infant was of such an Age as to be in Ward by the Law of the Land, it was holden that the Defendant

dant could not purge his Tort by this Usage; and therefore he was awarded to answer to the Ravishment. 19 *Ed. 2. Garde* 127. Chap. III.

Note; The Custom of Feoffment by an Infant at Fifteen, being against common Right, cannot be alledged in a Town, unless it be laid, that the Tenements are within some certain Fee or Borough, &c. 39 *Ed. 3. 2. b.* In what Places the Custom of Feoffment at 15, may be maintained.

C H A P. IV.

The Father to the Bough,
And the Son to the Plough.

The Origin
of this Cu-
stom. Spelm.
of Feuds 38.

Vide K. E-
thelred's Char-
ter in the Pre-
face to the
6th Report.

What the
Custom is.

THE hereditary Lands among the Saxons (otherwise called *Bocland*) were not subject to any Feodal Service, and therefore could not escheat to any Feodal Lord: And this was the general Usage of *England*, till the *Conqueror*, introducing hereditary Feuds, imposed therewith, among the Rest of the Feodal Servitudes, this of Escheats. But even then, as at this day, if a Man fled for Felony, and was outlawed, he being esteemed a common Enemy, *Caput Lupinum*, one out of the King's Protection, his Lands were forfeited to the Crown. And our *Kentish* Gavelkind retains these, as well as many other Properties of the Saxon *Allo-dium*; for by the Custom of *Kent*, if Tenant in Fee-simple of Lands in Gavelkind commit Felony, and suffer Judgment of Death, he shall incur Forfeiture of his Goods, but his Lands of that Tenure shall not be forfeited, nor escheat to the * King, or other Lord of whom they are holden; but the Heir, notwithstanding the Offence of his Ancestor, shall enter immediately, and en-

* Customs which are by Reason of the Land, as Gavelkind and Borough English, bind the King, but Customs by Reason of the Person or the Goods do not.
35 H. 6. 28. a. *Bro. Custom*, 5.

joy the Lands by Descent after the same Customs and Services, by which they were before holden. *Consuetud. Kanc. infra. Lamb. Peramb.* 611. 8 *Ed. 2. Itin. Kanc. Fitz. Prescription,* 50. 22 *Ed. 3. Prescription,* 40. *ibid. pl. 60. Dyer* 310. *b. 2 And. 152. Somn. 48, 53, 146. Bacon's Use of the Law, Oct. Edit. 139. 1 Sid. 137. 1 H. H. P. C. 360. 3 Bulst. 215. Dr. & Stud. 40.*

Which has given Occasion to the Proverbial Expression,

The Father to the Bough,
And the Son to the Plough.

Stat. 17 Ed. 2. de Prærog. Reg. c. 16. Or as it is somewhat differently expressed in the Manuscript Copy of the *Consuetudines Kanc.* in *Lincoln's Inn Library:*

The Fader to the Bonde,
And the Son to the Londe.

Nor shall the King have the Year, Day, and Waste of Lands in Gavelkind holden of a Common Person, where the Tenant is executed for Felony. *Consuetud. Kanc. infra. 8 Ed. 2. Itin. Kanc. Prescription,* 50. 20 *H. 6. 8. b. Stamf. de Prærog. 49. b. 50. a. Lamb. Peramb. 611. 3 Bulst. 215.* Which seems to be but a Consequence of the other Custom, according to the general Rule in *Bracton* 130. *a. 131. a. Non debet Rex de Jure habere annum & diem de aliquâ terrâ quæ non possit esse Escheata Dominorum.*

But

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How it is confined.

But this Custom holds only where the Defendant submits to the Judgment of the Law, and not where he withdraws himself from the Hands of Justice, and will not abide a legal Trial; for if Tenant in Gavelkind, being indicted for Felony, absent himself, and is outlawed after Proclamation made for him in the County; (or if formerly he had taken Sanctuary, and had abjured the Realm) his Heir shall reap no Benefit by the Custom, but the Lands shall escheat to the Lord, and the King shall have Year, Day, and Waste in them, if holden of another, in like manner as the Common Law directs, as to Lands which are not subject to the Custom of Gavelkind. *Consuet. Kanc. infra. Itin. Kanc. 55 H. 3. Rot. 86. 7 Ed. 1. Itin. Kanc. Rot. 31. Rex. 6 Ed. 2. Itin. Kanc. Plac. Coron. Rot. 62. 8 Ed. 2. Itin. Kanc. Prescription, 50. 22 Ed. 3. Prescription, 40. Statb. Custom, pl. 2. Lamb. Peramb. ⁶⁸⁰/₃₃₁ ⁶¹¹. Stamf. de Prærog. 40. b. 2. Roll's Rep. 368. 1 H. H. P. C. 360. Wright on Tenures 210. And so it was adjudged in *Kanc. 28 Eliz.* between *Brocas* and *Savage*, cited in the Margin of the last Edition of *Dyer* 310. b.*

‘ In Itinere *W. de Ralegh* in Com. *Kanc.*
 ‘ *Assisa Mortis Antecessoris*, &c. si *Adelophus*,
 ‘ &c. ubi dicitur, quod *Feloniam Antecessoris*,
 ‘ non impedit *Seisinam Hæredis*, nec *Suc-*
 ‘ *cessionem*; sed hoc specialiter in Com. *Kanc.*
 ‘ de *Tenementis*, quæ tenentur in *Gavelkind*,
 ‘ si ille, qui *Feloniam* fecerit, *judicium susti-*
 ‘ *nuerit.*’ *Bract. lib. 4. f. 276. b.*

It

It is said *obiter* in *Chapman's Case*, 2 *Roll's Rep.* 368. That if a Brother in Gavelkind is attaint, the Land shall escheat; tho' otherwise it is, if the Father be attaint; for *The Father to the Bough, and the Son to the Plough*: And the Reason there given is, That the Custom shall be taken strictly.

Chap. IV.
Whether a Brother shall inherit the Gavelkind Lands of his Brother executed for Felony.

But this is a mistaken Opinion. Mr. *Lambard* in his *Peramb.* 634. tho' he admits that some have doubted whether the Brother or Uncle shall have Advantage of this Custom, is notwithstanding of Opinion himself, That whoever the Heir be, he shall enjoy this Privilege under the Custom, as well as the Son; because the Words of the *Customal* extend to the Heir in general, and are not restrained to the Son alone.

And it is a Distinction unknown to most of the Authorities, both ancient and modern, the Words of which are general as to all Heirs; *Felonia Antecessoris non impedit Seisnam Hæredis, nec Successionem.* Bract. *supra.* And 8 *Ed.* 2. *Prescription*, 50. By the Custom of *Kent*, if a Man be hanged for Felony, the Lord shall not have the Escheat. And *Bacon's Use of the Law* 139. That the Land is not forfeitable nor escheatable for Felony. And 1 *H. H. P. C.* 360. That if the Ancestor be executed for Felony, the Land shall not escheat, but descend to the Heir.

And *Rot. Claus.* 8 *Rich.* 2. m. 2. *Kanc.* The King writes to the Sheriff of *Kent* to redeliver the Gavelkind Lands of a Man executed for Felony, which he had seized;

' Cum secundum Consuetudinem de Gavelkind Taylor of Gavelk. 107.

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‘ kind in hoc casu nos habere non debemus
 ‘ annum, diem, neque vastum, nec capitales
 ‘ Domini inde Escheatam ; sed *proximi He-*
 ‘ *redes* sic convictorum & suspensorum hære-
 ‘ ditatem suam immediate consequuntur, Fe-
 ‘ loniâ illâ non obstante.’

Dower of
 Gavelkind
 Lands not-
 withstanding
 Felony of the
 Husband.

And by the same Custom the Wife's
 Dower of the Moiety of Gavelkind Lands,
 was in no Case forfeitable for the Felony of
 the Husband, but where the Heir should lose
 his Inheritance. *Consuet. Kanc. infra. 8 H. 3.*
Prescription, 60. adjudged. Lamb. Peramb.
 $\frac{61}{33}$. *Noy's Max. 28.*

‘ Dos post Feloniam [mariti] peti non po-
 ‘ test a muliere, &c. nisi in casu speciali, sicut
 ‘ in *Kanciâ.*’ *Brañ. lib. 4. f. 311.*

This Custom
 extends not
 to High
 Treason.

This Custom holds only in Case of Fe-
 lony, and extends not to Treason ; for if a
 Man be any way attaint of this Offence, his
 Gavelkind Lands are forfeited to the King,
 notwithstanding this Usage. *Lamb. Peramb.*
 $\frac{61}{33}$. *Dav. 37. 1 H. H. P. C. 360. Wright's*
Tenures 118.

Whether to
 Petty Treason.

Indeed it seems the Custom may extend to
 Petty Treason ; for that Offence is by the
 Law properly comprehended under the
 Word Felony. *Co. Litt. 391. a.* The
 Lands escheat to the Lords of the Fee, as
 in other Felonies. *Stat. 25 Ed. 3. c. 2.* And
auterfois attaint of Murder is a good Plea to
 an Indictment of Petty Treason for the same
 Death ; because it has the same Judgment in
 Effect, and the *very same Forfeiture.* 3 Inst.
 213.

Whether to
 Felonies by
 Statute.

Peramb. 610.
 $\frac{61}{33}$.

Mr. Lambard says, That ‘ peradventure this
 ‘ Rule holds not in Felonies made by Statutes
 ‘ of

‘ of later Times ; because the Custom cannot
‘ take hold of that which then was not at all.’

Chap. IV.

As Felonies by Statute are now so numerous, this may be a Question of considerable Importance ; but it is remarkable, that no other Book, either ancient or modern, making mention of this Custom, takes Notice of this Point ; but all say, That the Custom extends to Felony, without offering at any Distinction.

Now Felony is the *Genus* of all capital Offences under Treason (except Piracy, which is an Offence by the Civil Law) ; and tho’ the *Species* of this Offence are much encreased within Time of Memory, yet they are created in Similitude of the old Felonies, and are to be punished in the same Manner, and no other. And when a Statute makes a new Felony, or says, the Offender shall suffer as in Cases of Felony, it entirely refers itself for the Punishment to the Common Law : And the Word *Felony* being *Vocabulum Artis*, we must have recourse to the Common Law for an Explanation of the Nature of it ; which tells us, That it is an Offence punishable with Death, with Forfeiture of Goods, with Corruption of Blood ; as a Consequence whereof the Land will escheat to the Lord (*pro defectu Heredis*, and not as an immediate Forfeiture) in all Places except in *Kent*, where the Custom is allowed to have Power to exempt the Gavelkind Lands from the general Rule, and the Inheritable Blood remains as to Tenements of this Nature, notwithstanding the Attainder of the Ancestor. And it is material, that the Escheat

of

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of the Lands is no Part of the Judgment in Felony, but merely a Consequence implied by the Law on suffering for any Offence of this Kind, to which the Custom of *Kent* is a necessary Exception.

If a Court has by Custom Power of holding Pleas, and an old Action is given by Statute in a new Case, it is within the Jurisdiction. 2 *Saund.* 254. *Green and Cole.* And the like Law on a Grant of Conusance of Pleas. *Hob.* 48. And it seems that the old Punishment of Felony being applied to a new Offence, our Custom may with a Parity of Reason extend to it.

Whether this Custom extends to Piracy.

Mr. *Lambard* likewise doubts whether this Custom extends to Piracy; which must be understood of an Attainder before Commissioners, by Virtue of 28 *H. 8. c. 15*, for on a Conviction of Piracy before the Admiral, no Forfeiture of Lands is incurred. The Words of the Statute are, That *such as shall be convicted of any such Offences, &c. shall have and suffer such Pains of Death, Losses of Lands, Goods and Chattels, as if they had been attainted and convicted of any Treasons, Felonies, Robberies, or other the said Offences done upon the Lands.* Which Words are merely relative, giving only the same Forfeiture for a Felony at Sea, as would be incurred by the like Offence at Land; and if Gavelkind Lands are not forfeitable in the latter Case, how can they be in the former?

Whether this Custom be in any other County besides *Kent.*

Twisden Justice says, in 1 *Sid.* 138. That he had heard that the Custom of *The Father to the Bough*, &c. was in no other County or Town except in *Kent.* But Mr. *Taylor* in his *Hist.*

Hist. of Gavelkind 106. mentions that the Gavelkind Lands in the Liberty of *Urchinfeild* in *Herefordshire* partake of the same Privilege.

Indeed the same Author says, that this was the Right of all *Wales*; which is certainly a Mistake, for it appears by *Statutum Wallie*, 12 Ed. 1. that even at the Time when the Lands in that Principality were partible among the Males, the Attainder of the Ancestor for Felony was a Bar to the Heir: *Si excipiat quod Antecessor, vel aliquis in descendendo commisit Feloniam, per quam sibi non competit actio, &c. terminetur per recordum Justiciariorum, vel per Inquisitionem Patrie de suspensione, &c.*

In the Stat. *de Prærog. Regis*, c. 16. it is mentioned to be used in the County of *Glocester* by Custom, That after one Year and one Day the Lands and Tenements of Felons shall revert and be restored to the next Heir, to whom they ought to have descended, if the Felony had not been done.

But this Custom differs from that of *Kent* in one Respect, That the King shall have the Year, Day, and Waste; but not so of Lands in Gavelkind. *Stamf. de Prærog.* 50. a.

CHAP. V.

Of the Custom of Kent to devise Gavel-kind Lands.

Book II.



WHETHER Gavelkind Lands in *Kent* were deviseable by the Custom of that County, or not, was a Question formerly much litigated; it being a very valuable Privilege before 32 *H. 8.* when it was not in the Power of the Owner of any Lands in this Kingdom to alien them, without a special Custom of the Place where they lay, by any Act to be ambulatory till the Time of his Death; but he was put to depart with the legal Estate, by making a Feoffment to his own Use, or to the Use of his Will, and that Use he might devise; an Invention too but of later Times, and attended with some Inconveniences. Nor did this cease to be a Matter of Importance on the general Liberty given by the Statutes of Wills to devise Socage Lands by Will in Writing; for these Statutes, being in the Affirmative, were holden not to take away a Custom of devising, *Co. Litt. 111. b. 3 Rep. 35.* and consequently the Assistance of the Custom was still wanted to make a Will of Socage Lands, when joined with a Devise of Lands holden by Knight-Service in *Capite*, good for the Whole of the Socage, which otherwise had been void for a third Part; 2 *Sid. 153.* and likewise to make effectual Devises by Parol; for I take it that the Custom was claimed even for them. 2 *Sid. 154. Somn. 161.* But this

1

Question

Question is now rendred entirely useles by 12 Car. 2. 24. which has reduced all Lands to common Socage; and the Statute *against Frauds and Perjuries*, 29 Car. 2. 3. *sect.* 5. which enacts, That "All Devises or Bequests " of any Lands or Tenements, deviseable " either by Force of the Statute of Wills, or " by this Statute, *or by Force of the Custom of* " Kent, or the Custom of any Borough, or " any other particular Custom, shall be in " Writing, and signed by the Party so de- " vising the same, or by some other Person " in his Presence, and by his expresse Direc- " tions, and shall be attested and subscribed " in the Presence of the said Devisor by " three or four credible Witnesses, or else " they shall be utterly void and of none " Effect."

But as many Things grow Matters of greater Curiosity by ceasing to be of Use, I shall briefly take Notice of the most material Arguments and Authorities which occur in the Books, either for or against this Custom.

Arguments con. the Custom.

1. That it is a Rule in Law, That an Affize Arguments of *Mortdancestor* lies not of Lands deviseable against the Custom. by Will; though it be not alledged by the Plea, that they are actually devised. *Fleta* 296. *b.* 4 *Ed.* 2. *Fitz. Mortdancestor*, 39. 22 *Aff.* *pl.* 78. *F. N. B.* 196. *I.* Yet it appears by *Braff.* *f.* 276. *b.* and by several antient Records cited in *Somner*, That an Affize of

Book II. *Mortdancestor* lies for Gavelkind Lands in *Kent*. *Somn.* 152.

2. That it is evident there was within the City * of *Canterbury* a special Custom to devise Lands; but there needed no such Custom, if all Gavelkind Lands in *Kent* had been deviseable. *Somn.* 152. The City of *Canterbury* having, within Time of Memory only, been separated from the County of *Kent*.

3. That most of the antient Wills of Gavelkind Lands in *Kent*, mention Feoffees to Uses, particularly the Will of *Fineux, Ch. 7*.

* *Itin. Kanc.* 55 H. 3. *Rot.* 85. 'Juratores dicunt super sacramentum suum, quod Consuetudo Civitatis Cantuar. talis est, quod quilibet de Civitate predicta potest legare Messuagia sua, quæ habet in eadem Civitate, adeo benè sicut & alia bona & catalla sua.' And in 55 H. 3. *Itin. Kanc. Rot.* 18. it is pleaded, That the Tenements within the Borough of *Mensire* (now called *Minster*, in the Isle of *Thanet*) were deviseable by Will *secundum Consuetudinem Burgi, &c.* And in *Aff. in Com. Kanc.* 4 Ric. 2. in an Affize brought by *John Croke* and *Dionisa* his Wife, against *John Bolle* and *Alice* his Wife, the Tenants plead, That the Tenements are 'infra quoddam Dominium vocatum *Burgum Monachorum* in Villâ de *Sesaltre*, quod quidem Dominium est Prioris Ecclesiæ Christi Cantuar', &c. & etiam quod omnia terræ, & tenementa infra idem Dominium sunt, & a tempore quo non extat memoria, legabilia, & legata fuerunt pro voluntate tenentium eorundem, tam uxori- bus hujusmodi tenentium, quam aliis;' and pleads a Devise accordingly. Nor have I been able to find in the Records of the *Kentish Iters*, or among the Pleas before Justices of Affize, any one Title made under a Devise by the general Custom of the County, or indeed any Foot-
steps of such a Custom.

of

of *B. R. Read, Ch. J. of C. B. and Butler, Just.* who, had there been any Custom to devise, could not have been ignorant of it. *Somn.* 152, 153.

4. In the Register there be 14 Writs of *Ex gravi Querelâ*, for Lands deviseable; yet not one of them takes Notice of the Custom of any County. *Somn.* 153. Nor was there ever any such Writ for any Lands in the County of *Kent* at large out of some City or Borough. *Somn.* 161.

5. In several Wills of Lands to be found in the Registers of *Canterbury* and *Rocheſter*, in the Interim between the Statute of Uses, 27 *H. 8.* and of Wills, 32 *H. 8.* (a Time most proper for the Custom to have exerted itself) there are Clauses bequeathing to the Heirs at Law pecuniary Legacies, in Case they did not controvert the Devise; a plain Argument of the Distrust and Doubt of the Testator of their Validity. *Somn.* 163, 164.

6. It appears by many Offices before the Escheators, and continual Enjoyments accordingly, that since the Statute 32 *H. 8.* in many Cases, where Men have died seised of Gavelkind Land, and Land holden by Knight-Service in *Capite*, and have devised the Whole, the Heir has notwithstanding had a full third Part. *Somn.* 154, 155. 2 *Sid.* 154. Which had not been, had the Gavelkind Land been deviseable by Custom; as appears by 3 *Rep.* 35. *a.*

7. That there is no Mention made either in *Lambard's Perambulation*, or in the *Consuetudines Kancie* of any such Custom.

8. *Pasch. 37 Eliz. C. B.* Between *Haltou* and *Staribop*, it was agreed by the Court, on Evidence to a Jury of *Kent*, That Gavelkind Lands in that County were not deviseable by Custom. *Somn. 155.*

Arguments pro the Custom.

Arguments
for the Custom.

1. That the Customs of *Kent* are supposed to be the Remains of the old Common Law; and Lands during the *Saxon* Times were deviseable by Testament. *Nat. Bac. of Government*, Quarto Edit. 108. *Somn. 84.* As appears by the Will of *Ethelstan Atheling*, Son of King *Ethelred*, Anno 1015. transcribed in the Appendix to *Somn. 198.* and that of *Byrbric* in *Lamb. Peramb. 492.* and the *Textus Rossensis*, now published by *Hearne*.

44 *Ed. 3. 33.*
a. 35 *Ass.*
pl. 1.

2. To the first Argument made use of against the Custom they answer, That an Affize of *Mortdancestor* does lie of Lands deviseable, if the Ancestor died seised; indeed if the Defendant shew an actual Devise to himself, it is a good Bar to the Action. *Launder and Brookes, Cro. Car. 562.* And of the same Opinion was *Glynne, Ch. J.* in the Case of *Browne and Brookes, 1659.* (according to a Report I have seen of that Case under the Hand of *Pemberton*, afterwards Chief Justice) and said, That the Books abridged by *Fitzb. tit. Mortdancestor, 39, 52.* to the contrary were not Law. To whom *Newdigate, Just.* assented, and said, That the Books, which report, that on the Plea that the Lands were deviseable, the Writ of *Mortdancestor* abated, are to be understood, that
on

on the Plea that they were deviseable *and actually devised*, the Writ abated.

3. In Answer to the fourth Argument they rely on *F. N. B.* 198. L. which says, that the Writ *Ex gravi Querelâ* lies where a Man is seised of any Lands or Tenements in any City or Borough, or in *Gavelkind*, which Lands are deviseable by Will Time out of Mind. And in *Noy's Max.* 24. It is said, that *Gavelkind* Lands may be given by Will by the Custom.

4. There are in the Registers of *Canterbury* and *Rocheſter* divers Wills of Lands in the Times of *H. 6. Ed. 4. H. 7.* in several upland Villages in *Kent*, which cannot lay a Custom to devise merely within themselves, and no Mention made of Feoffees to any Use. *Co. Litt. 110. b.* *Launder and Brookes, Cro. Car. 561. Browne and Brookes, 2 Sid. 154.*

5. In the Case of *Launder and Brookes* was shewn a Book of Reports, where in 41 & 42 *Eliz.* the Court of *C. B.* agreed, that there was such a Custom in *Kent*.

6. This Question was tried several Times on the Will of *William Brookes*; and there is Mention made in *Cro. Car. 561.* of two Verdicts in that Case for the Custom on Trials at Bar, and one Nonsuit of the Plaintiff (whose Title was from the Heir) after the Jury had withdrawn to consider of their Verdict, the Opinion of the Court being for the Custom; and though there had been one Verdict for the Plaintiff, yet *Finch Ch. Just.* shewed his Dislike of that Verdict. *Launder and Brookes, Cro. Car. 561.* And afterwards, on a Trial on the same Will and Custom

Book II.



it is said, that six Verdicts were produced, which had all been for the Custom, and though there was then a Verdict against the Custom, yet the Court disapproved of it. 2 *Sid.* 154. *Browne* and *Brookes*. And it being contrary to their Directions (according to the manuscript Note I have already cited) they carried their Dislike of it so far, as to stay the Entry of the Judgment in that Action, till a new Ejectment brought by the late Defendant should be tried.

7. In the Case of *Hammond* and *Thornbill*, *Style* 476. It is affirmed by *Serjeant Twifden* (a *Kentish* Man) that Gavelkind Lands, tho' they come to be holden by Knight-Service, are devisable by Will by the Custom of *Kent*.

8. This Matter was again tried at the King's Bench Bar by a Jury of *Kent*, *Pasch.* 14 *Car.* 2. entred *Hill.* 13 *Car.* 2. *Rot.* 476. who found that Gavelkind Lands were devisable by the Custom of *Kent*. *Wiseman* and *Cotton*, 1 *Sid.* 77, 135. *Hard.* 325. *Ray.* 59, 76. 1 *Lev.* 79.

Ante 77.

Which last Verdict seems to have settled the Question in Favour of the Custom: And accordingly the Clause of the Statute of Frauds above-mentioned takes Notice of the Custom of *Kent* to devise.

And the same Custom to devise Gavelkind Lands in this County was likewise found about the Beginning of *Queen Anne's* Reign by two Verdicts; one between *Arthur* and *Bockenham* in *C. B. Fitzb-Gib.* 233. and the other in the Case of *Bunker* and *Cooke*

Cooke in *B. R. Fitz-Gib.* 225. *Salk.* 237. Chap. V.
both on the Will of *William Bockenbam*.

The Case was this; *W. Bockenbam* devised to his Wife all his Lands, Tenements and Estate whatsoever, of which he should be possessed or invested with at the Time of his Decease: He afterwards purchased Lands of the Nature of Gavelkind in *Kent*, deviseable by Custom of that County; and the Question on a special Verdict was, whether these after-purchased Lands could pass by the Will: It was insisted, that if the Statutes of Wills did not enable a Man to devise Lands before he was seised of them, because the Words are, *every Person having Lands*, yet that Lands deviseable by Custom differ; because these Customs, as appears by the Writ *Ex gravi Querelâ*, are to devise his Lands and Tenements *tanquam bona & catal-la sua*, and a Man may dispose of the Chattels and personal Estate, that he shall acquire after the Time of his Will. But *Holt Ch. Just.* and the whole Court of *B. R.* held, that the Lands passed neither by the Statute, nor by the Custom; for that is to devise *Tenementa sua*, and therefore before he can dispose of them they must be *sua*, they must be his Property; and if they are not *sua* at the Time of the Devise, they are out of the Custom. And the Pleading in the Case of customary Devises is, that the Testator *being seised* in Fee did devise. And this Judgment of *B. R.* was affirmed in the House of Lords. *Fitzb.* 225. *Bunker and Coke, Salk.* 237. *S. C.* And the same was determined in the Common Pleas in the Case of *Arthur and Bockenbam*.

This Custom enables not to devise Lands which the Devisor had not at the Time of the Will, but purchased after.

F. N. B. 199.

Book II.



Bockenham. Fitzb. 233. In which Book are the Arguments of *Holt* and *Trevor* Ch. J. very fully reported.

Of Evidence
of the Custom
of devising,
&c.

Cro. Car.
561.

As the particular Customs of Gavelkind are traversable, it may be proper here to take Notice of some Evidence of an extraordinary Nature admitted in the Case of *Launder* and *Brookes*, to prove this Custom of devising. 1 *Lambard's Perambulation of Kent*, out of which was shewn the Copy of the *Customal*, saying, that Lands may be given or sold without the Lord's Licence. And a Precedent was produced out of the same Book, pag. 492. (as it seems by the Court themselves) of a Testament before the Conquest.

2. *Law-Books*, as *F. N. B. 198. L. (supra)* and a Book of Reports, where in 41 & 42 *Eliz.* the Court of *C. B.* agreed, that there was such a Custom in *Kent*.

The Custom of devising Lands of the Nature of Gavelkind is not confined to *Kent* alone, for *Jones* Just. in the Case of *Launder* and *Brooke*, says, that in *North-Wales* there is much Land, formerly of this Nature, by Custom devisable by Writing, or without Writing. And *Twisden* Just. says, 1 *Sid. 137.* that the Custom of Devising still remains there, notwithstanding the Land is disgavelled by 34 & 35 *H. 8.*

And in the Liberty of *Urchenfield*, where the Lands are Gavelkind, there is a Custom found by Verdict of devising Lands purchased, as appears by a Record 20 *Ed. 1.* in *Receptu Scaccarii*, cited in *Taylor's Hist. of Gavelkind* 110.

CHAP.

C H A P. VI.

Of the Custom of GAVELET.

THE Writ of *Cessavit* was introduced *Of Cessavit*
 as the general Law of the Kingdom by Statute.
 by the Statute of *Glocester*, c. 4. (6 Ed. 1.)
 in the Case of Tenant in Fee-Farm: That
 if a Man lets his Land to Fee-Farm, or to
 find Estovers in Meat or Clothes to the
 fourth Part of the Value of the Land, and
 he who holds the Land so charged, lets it
 lie fresh and unoccupied, so that the Party
 can find no Distress there, for the Space of
 two Years together, the Lands may be re-
 covered by this Writ, unless the Tenant
 comes before Judgment and pays the Ar-
 rearages and Damages, and finds sufficient
 Sureties to pay the Rent for the Future.
F. N. B. 210. *A.* 2 *Inst.* 295. And an-
 other Writ of *Cessavit* was given in imita-
 tion of the former by Stat. *Westm.* 2. 21.
 (13 Ed. 1.) to the Lord where the Tenant
 with-holds his accustomed Services for two
 Years, letting the Land lie without sufficient
 Distress; or in Case he encloses the Land, so
 that the Lord cannot distrain. *F. N. B.* 208.
H. & K. 2. *Inst.* 401. And a like Writ lies
 by the same Statute, c. 41. for Lands given
 for Alms, &c. if such Alms are withdrawn for
 two Years.

But the County of *Kent* has from Time *Of Cessavit*
 immemorial had a Proceeding for the *Ces-* by the Custom
ser of the Tenant, called *Gavelet*, (*Consuet.* of *Kent*.
Kanc.

Book II.



Kanc. 55 H. 3. *Ilin. Kanc.* Rot. 16 & 79. 6 Ed. 2. *Ilin. Kanc.* Rot. 29. *Plac. Coron. Somn.* 31.) very different from that given by Statute.

If Tenant in Gavelkind with-holds from his Lord his due Rents or Services, the Custom of this Country gives the Lord a special and solemn kind of *Cessavit* after this Manner; The Lord, after such Cessing, ought by * Award of his three Weeks Court to seek from Court to Court till the fourth Court

* This Proceeding bears a strong Resemblance to that of the Feudal Law, for the Contumacy of the Tenant. ‘ Dominus vocat militem, qui ab eo feudum possidebat, dicendo eum in *culpam* incidisse, per quam feudum amittere debeat; hic non respondet: Queritur, quid faciendum sit Domino? Respondeo eum ad Curiam vocari debere, & si non venerit, iterum eum debere vocari usq; in spatio tertio septem vel decem dierum, arbitrio ejusdem Curiae terminando. Quod si neq; venerit ad tertiam vocationem, hoc ipso feudum amittat: Et ideo debet Curia Dominum mittere in possessionem. Sed si infra annum venerit, restituitur ei possessio; Alioquin & beneficium & possessionem amittit. *Feudor. Lib. 2. tit. 22.*’ And With-holding the Services is reckoned, by the Constitutions of the Emperor *Conrad*, amongst the Offences for which the Tenant incurs a Forfeiture. *Si servitium debitum facere recusaverit, vel feudum abnegaverit. Lib. 3. tit. 1. & Spelm. Glos. sub verbo Felonia.* But I take it that the Origin of our Custom is rather to be referred to the old Common Law of this Kingdom, before the Introduction of Feuds; for by the eighteenth Law of *Canute*, ‘ Nemo Namium capiat, nec in Comitatu nec extra Comitatum, priusquam ter in Hundredo suo rectum sibi perquisierit. Si tertia vice rectum non habeat, eat quartâ vice ad Comitatum (*Scyregemote*) & iste Comitatus quantum statuito diem; & si nec tum quidem impetrarit, liberam sui juris ubivis



Court in the Presence of Witnesses, whether any Distress may be found on the Tenements, or no; and if within this Time he can find none, then at the fourth Court it shall be awarded, that he take the Tenements into his Hands as a *Distress* or *Pledge* for the Rent or Services withdrawn, and he shall detain them for a Year and a Day without manuring or occupying them; within which Time if the Tenant comes, and pays the Arrearages, and makes reasonable Amends for with-holding the same, he shall enjoy his Tenements again: But if he come not within that Time, then at the next * County Court, the Lord ought in Presence of Witnesses to declare his former Proceeding, to the End that it may be notorious; and after this County Court holden he shall, by Award of his own Court, enter into the Lands, and occupy them as his own Demesnes. *Consuet. Kanc. infra. Lamb. Peramb.* ^{672 613}/₅₅₃. And if the Tenant comes afterwards, and is desirous to have the Tene-

‘ubivis recuperandi licentiam assequitor.’ And the very same Law is to be found among those of *William the Conqueror*. *Namium*, from the Saxon Word *Name*, signifies a *Distress* or *Pledge*; and this term is applied to our Custom by *Bracton*. ‘Si Dominus per Considerationem Curie sue pro defectu servitii ceperit tenementum in manum suam, sicut *simplex Namium*, donec de redditu fuerit satisfactum, &c. Et de hac materiâ satis inveniri poterit in *Itinere* in *Com. Kanc.* Anno Regni H. 12. *Bract. Lib. 4. c. 27. fol. 205. b.*

* So read *Counte* with *Lambard's* Copy of the *Customal*, and the MS. of *Lincoln's Inn*, and not *Courte*, as is printed by *Tortel*.

ments

Book II.

V. *infra*.

Affize.

Verdict finds
the Custom of
Kent concern-
ing *Cesser*.

ments again of his former Estate, he shall, before he be re-admitted Tenant, pay the whole Rent in arrear, and perform his other Services, and likewise make amends to the Lord for the undue Detention of them: Concerning the Measure of which Amends the Copies of the *Customal* differ: some assessing it at 5*l.* others at nine Times the Rent, others saying only in general, that he shall make Composition, leaving the Quantity uncertain. Nor are the Evidences of this Custom on Record more reconcileable one with the other in this Instance, though they agree well enough in other Particulars.

‘ 55. H. 3. *Iiin. Kanc. Rot. 7. Affisa*
‘ venit recognitura si *Milefenta*, quæ fuit
‘ Uxor *Johannis de Langeden*, & alii injuste
‘ disseisiverunt *Alexandrum Mayle* de Tene-
‘ mento suo in *Eastbarling*. *Affisa* capta per
‘ Defaltam.

‘ *Juratores* dicunt super sacramentum
‘ suum, quod prædictus *Alexander* tenuit præ-
‘ dicta tenementa de prædictâ *Milefentâ* per
‘ certum servitium, & quia prædictum servi-
‘ tium ei aretro fuit, ipsa per Considerationem
‘ Curia suæ distrinxit pro prædicto redditu;
‘ sed dicunt, quod ipsa, incontinenti post-
‘ quam prædicta districtio ei adjudicatâ fuit,
‘ adivit tenementum illud, & illud in manu
‘ suâ tenuit, & in illud manuoperata fuit,
‘ & arbores in eo crescentes abscidit, quod
‘ ei facere non licuit secundum *Consuetudinem*
‘ *Kanc*; quæ talis est, quod cum redditus ali-
‘ cui aretro est ex aliquo tenemento, quod te-
‘ netur in *Gavelykynde*, ipse debet adunare
‘ Curiam suam, & ibi ostendere qualiter red-
‘ ditus

ditus suus aretro est, & ibi in Curia illa. Chap. VI.
 considerari debet districtio per ea, quæ in-
 venta fuerint in tenemento illo, & illam
 districtionem tenere quousq; satisfactum
 fuerit ei tam de redditu, quam de arrera-
 giis; & si nulla catalla fuerint inventa in
 tenemento illo, tunc per considerationem
 Curie suæ debet Dominus feodi capere
 feodum in manu sua, absq; aliquâ manu-
 operatione in eo faciendâ, & postea acce-
 dere ad *Comitatum*, & ibi ostendere quali-
 ter redditus suus in aretro est, & quod ipse
 nihil invenit in tenemento suo per quod
 distringere potest pro prædicto redditu suo,
 & ibi dicendum est ei, quod redeat ad Cu-
 riam suam, in quâ considerari debet, quod
 prædictus Dominus feodi distringere possit
 pro prædicto redditu suo & ejus arreragio,
 & tenementum, quod de ipso tenetur, in
 manu suâ capere, & in eo manuoperare, &
 explecia omnimodo inde provenientia ca-
 pere quousq; de prædicto redditu simul cum
 arreragiis ei plenè satisfactum fuerit: Et
 priusquam omnia prædicta adimpleta fue-
 rint, non licebit Domino feodi aliquam
 operationem in tenemento suo facere.
 Unde dicunt, quod eadem *Milifenta*, non
 observatâ prædictâ solemnitate, seifivit præ-
 dictum tenementum in manu suâ, & in
 eo manuoperata fuit, & quod ipsa dissei-
 fivit prædictum *Alexandrum* de tenemen-
 to suo. Ideo Consideratum est quod præ-
 dictus *Alexander* recuperet seisinam suam,
 &c.

21 Ed. 1. Itin. Kanc. Rot. 23. Berewicke
 Roll. An Assize brought by Adam de
 Wandle-

Book II.
Affize.

The Tenant
pleads, that
he seized the
Lands by the
Custom of
Kent, for the
Cesser of his
Tenant.

The Custom.

Wandlesworth and *Joan* his Wife against *Stephen de Bencester*, who pleads, That the Tenements in Question were holden of his Manor of *Alynton*, by the Service of 20d. and Suit of Court; ‘ Et quia Servitium illud aretro fuit
‘ per unum annum & unum diem, postquam
‘ idem *Adam* & *Johanna* habuerunt prædictum
‘ tenementum, ipse cepit tenementum illud
‘ in manum suam secundum Consuetudinem
‘ usitatam in Comitatu isto de Tenementis,
‘ quæ tenentur in Gavelykend; quæ quidem
‘ *Consuetudo talis est*, scil. quòd quando Red-
‘ ditus alicujus aretro est de aliquo tenemen-
‘ to, quod tenetur in Gavelykend, ipse debet
‘ adunare Curiam suam, & ibi ostendere qua-
‘ liter redditus suus aretro est, & ibi in Curia
‘ illà considerari debet Districtio per ea, quæ
‘ inventa fuerint in Tenemento illo, & illam
‘ districtionem tenere quousq; satisfactum
‘ fuerit ei tam de redditu, quam de arre-
‘ rariis; & si nulla Catalla fuerint inventa
‘ in Tenemento illo, tunc per Consideratio-
‘ nem Curia suæ debet Dominus feodi ca-
‘ pere Feodum in manum suam, absq; aliquâ
‘ manuoperatione in eodem faciendâ, & * il-
‘ lud tenere per unum Annum & unum Diem,
‘ & postea accedere ad Comitatum, & ibi
‘ ostendere qualiter redditus suus aretro est,
‘ & quod ipse nihil invenit in Tenemento
‘ illo, per quod distringere potest pro præ-
‘ dicto redditu suo, & ibi dicendum est ei,
‘ quod redeat ad Curiam suam, in quâ con-
‘ siderari debet, quod prædictus Dominus

* These Words are not in the foregoing Record, tho’ the greater Part of this is copied from the other.

‘ feodi

feodi capiat tenementum, quod de eo tenetur, in manum suam, & in eo manuopertur, & explecia omnimodo inde provenientia capiat, quousq; tenens venerit *ad novies deaurandum & novies solvendum*, si tenementum suum rehabere voluerit. Unde dicit, quod quia redditus prædictus aretro fuit de Tenemento prædicto, & ipse nullam in eo invenit districtionem, ipse solennitate prædictâ in omnibus observatâ cepit tenementum illud in manum suam per Considerationem prædictam, sicut ei bene licuit, absq; aliquâ disseisina sive injuriâ inde faciendâ, &c.

The Demandants in their Replication deny not the Custom; but that the Tenements are holden of the Manor. And afterwards there is a *Retraxit*.

55 H. 3. *Itin. Kanc. Rot. 15. in dorso*. In Assize. an Assize of *Mortdancestor* the Tenant pleads,

Quod prædictus *Nicholaus* aliquo tempore tenuit prædicta tenementa de ipso per certum servitium in *Gavelykynde*, quod quia ei aretro fuit, ipse per longum tempus ante mortem ipsius *Nicholai* distrinxit primo feodum suum, & postea cum nichil invenisset in feodo suo per quod distringere posset pro arreragiis prædicti redditus, ipse per Considerationem Curiae suae seilivit tenementum suum in manum suam jam triginta & sex annos elapsos, & sic tenementum illud in manu suâ hucusq; tenuit, quousq; idem *Nicholaus*, vel aliquis hæredum suorum ad eum accederet *finem facturus pro arreragiis* prædicti servitii, prout ei bene licuit secundum Consuetudinem *Kancie*, unde dicit quod prædictus *Nicholaus* non obiit seisitus, &c.

The Tenant pleads, That he seized the Premises by the Custom of Kent, for Cesser.

Book II.

Assize.

Verdict,
That the
Lord seized
the Premises
for the Cesser
of his Ten-
nant, in the
Name of Ga-
velet; but
that he ne-
glected to ap-
ply to the
County
Court, &c.
as the Custom
requires, &c.

56 H. 3. Itin. Kanc. Rot. 79. An Assize
of Mortdancestor, by John Son of Richard le
Mariner, against Sarab de Polstede. 'Capi-
'atur Assisa per defaultam. Juratores dicunt
'super sacramentum suum, quod reverâ pre-
'dictum tenementum fuit aliquo tempore
'ipsius Ricardi le Mariner, de cujus morte,
'&c. & quod idem Ricardus tenuit præ-
'dictam terram de quadam Agnete de Henley
'per certum servitium, & de quo servitio
'prædictus Richardus per sex annos ante
'mortem suam non satisfecit prædictæ Ag-
'neti, immò dimisit terram illam jacere in-
'cultam, propter quod ipsa Agnes seisivit
'prædictum tenementum in manum suam
'per Considerationem Curia suæ, nomine
'Gaveletti, & illud tenuit in manu suâ per
'unum annum; sed dicunt quod eadem Ag-
'nes per prædictum annum non adivit Comi-
'tatum, prout moris, ad habendum ibi Con-
'siderationem Comitatus, prout Consuetudo
'Kancie requirit: Et quod eadem Agnes
'nihil habuit in prædicta terrâ, nisi nomine
'pignoris. Consideratum est quod prædic-
'tus Johannes recuperet seisinam suam,
'&c.'

The next Record I shall insert for the Pe-
culiarity of the Judgment; which indeed
seems rather founded on the Consent of the
Parties, than the Right of the Matter.

Assize.

7 Ed. 1. Itin. Kanc. Rot. 19. Rex Roll.
'Assisa venit recognitura si Jobanna, quæ fuit
'uxor Rogeri de Romenal, & Stephanus filius
'ejus injuste disseisiverunt Rogerum filium
'Johannis de, &c.'

Et

Et prædicta *Johanna* dicit, quòd prædictus *Rogerus* tenet tenementum prædictum de prædicta *Johanna*, et dicit quòd servitium, quod de prædicto tenemento ei debet, ei aretro fuit de uno anno & amplius, per quod Curia prædictæ *Johannæ* simul cum ipsâ *Johannâ* adivit Comitatum simul cum ipsâ, & in pleno Comitatu illo semel, bis, ter quæsta fuit de ipso *Rogero*, quòd servitium suum debitum ei aretro fuit per unum annum & amplius, nec per aliquam distractionem illud servitium de eo habere potuit; & dicit quod *Consuetudo Comitatus istius* talis est, quòd si tenens alicujus in servitio suo defecit, & servitium illud detinuit per unum annum & unum diem, & super hoc vincatur, quòd licet Domino suo tenementum illud ingredi, & illud in manum suam tenere, quousq; ei satisfactum fuerit de prædicto servitio, & de arreragiis, secundum Consuetudinem *Kancie*: Et dicit, quòd idem *Rogerus* convictus fuit quòd servitium suum de prædicto tenemento ei aretro fuit per duos annos & amplius, per quod Comitatus consideravit, quòd eadem *Johanna* ingrederetur tenementum illud, & illud teneret quousq; ei satisfactum fuit in forma Consuetudinis prædictæ; & dicit, quòd ratione ejusdem Considerationis ingrediebatur ipsa terram illam, & illam adhuc eâ ratione tenet; & quod taliter intravit terram illam, & non per disseisinam, petit quòd inquiratur per Assisam. Et quia *Juratores* super sacramentum suum testantur, & dicunt quòd prædicta *Johanna* & *Stephanus* ingrediebantur prædictam ter-

The Tenant
pleads the
Custom of
Kent concern-
ing Cesser;
and that she
seized the
Lands on that
Account.

Verdict ac-
cordingly.

Book II.

Judgment,
&c.

ram eâ ratione, quam prædicta *Johanna* dic-
cit, & non per disseisinam, & super hoc ve-
niunt prædicti *Stephanus* & *Johanna*, & con-
cedunt, quòd prædictus *Rogerus* rehebeat
prædictam terram quacunq; horâ ei satisf-
factum fuerit de redditu prædicto & arrera-
giis, in formâ Consuetudinis prædictæ; Ideò
dictum est prædicto *Rogero*, quòd satisfaciat
ei de prædicto servitio & arreragiis, &c.
Postea veniunt Juratores, & adinvicem exa-
minati & requisiti quantum aretro fuit præ-
dictæ *Johannæ* de arreragiis servitii prædicti
Rogeri, dicunt quòd quatuor libræ decem
& novem solidi: Et Ideo Consideratum est
quòd prædictus *Rogerus* recuperet seisinam
suam de prædictis tenementis, & idem *Ro-
gerus* satisfaciat eidem *Johannæ* de arreragiis
prædictis. Et præceptum est Vicecomiti,
quòd de terris & catallis prædicti *Rogeri*
fieri faciat, &c. de die in diem, & ea sine
dilatione habere faciat prædictæ *Johannæ*,
&c.

This Custom of *Gavellet* is likewise pleaded
in *Itin. Kanc.* 39 *H.* 3. *Rot.* 3. in dorso. 43
H. 3. *Itin. Kanc. Rot.* 2. 55 *H.* 3. *Itin.*
Kanc. Rot. 16. 6 *Ed.* 2. *Itin. Kanc. Plac.*
Coron. Rot. 29. But as it is in a more brief
Manner than in the foregoing Records, it
will not be necessary to insert them.

5 *Co.* 84. *b.* It is said, That there is a
Custom in *Kent*, that if the free Tenants of
a Castle do not pay their Rent, they shall lose
their Land holden of it.

Mr. *Lambard* in his *Perambul.* §14. says,
That he cannot certainly affirm whether this
Custom were put in Ure in his Time: But
the

the Instances already given sufficiently shew that it was anciently in Use as a common Remedy; and even a private Prescription to the same Effect has been holden good and reasonable. *Per Frowike, 21 H. 7. 13. b.* There has been a Case in our Books, that a Man prescribed, that he, and all those whose Estate he has in the Manor of *D.* have used Time out of Mind, that if any of their Tenants in the said Manor ceased to pay his Rent, and no Distress could be found on his Tenancy for the Space of a Year, they should enter into the Tenements, and hold them for ever. And this was adjudged a good Prescription*. And it is certainly stronger, as the Custom of a whole County.

Nor does any Thing hinder but that it may be put in Practice at this Day, if the Lord, after he has gone through the Ceremonies required by the Custom, will avoid the Doubt above-mentioned concerning the Measure of the Amends, by reaccepting the Person as his Tenant, on the easy Terms of discharging the Arrears.

This was formerly esteemed so proper a Remedy, that the Legislature, in the 10th Year of *Ed. 2.* thought it worthy their Imitation, and framed the Statute of *Gavellet* for Rents arrear in *London*, after the Manner of our Custom, as will appear on Comparison. *Vide le Stat.*

* But a Custom of the Town of *B.* that if a Tenant ceased to pay his Rent for two Years, the Lord might enter into the Lands till Composition made with him for the Arrears, was held a bad Custom, because only alledged in this single (*upland*) Town, and not in the others round about. 43 *Ed. 3.* 32. *a.*

Of the Trial in a Writ of Right.

The Words of Mr. Lambard's Copy of the Customal are, *Ils cleymēt per especial Fet le Roy Henrie Pere le Roy Edward, que ore est, que Dieu garde, que de Tenements, que sont tenus in Gavylekēde ne seit prise Bataille, ne graunde Affize per xii Chivalers, sicome ailours est prise per le Reaume; ceo est ascavoir la ou Tenant e le Demandant tenent per Gavylekēde, mes en lu de ces grandes Affises seient prises Jurees per xii homes Tenantz in Gavylekēde, issint que quatre Tenants in Gavylekēde elisent xii tenentz de Gavylekēde Jurors.*

This special Kind of Affize is undoubtedly their Right; for the Charter above-mentioned is enrolled, *Rot. Claus.* 15 Hen. 3. m. 14. in the following Words:

Charter of
Hen. 3. granting that the
Grand Affize
for Gavelkind Lands
shall be by
Tenants in
Gavelkind.

‘ Rex concessit per Cartam suam, pro se & hæredibus suis, hominibus de Com. *Kanc.* quòd de Tenementis, quæ tenentur in Gavelykynde, in eodem Comitatu de cætero non teneantur magnæ Affisæ per xii Milites, sicut alibi capiuntur in regno nostro, sed loco magnarum Affisarum illarum capiuntur Juratæ per duodecim homines tenentes in Gavelykynde, in formâ & in eisdem locis, secundum quod Magnæ Affisæ prius inde capiebantur; ita quòd quatuor tenentes in Gavelykynde eligant duodecim tenentes in Gavelykynde inde Juratores, sicut quatuor Milites eligere consueverunt duodecim Milites in Magnâ Affisâ. Et si forte contingat, quòd prædicti duodecim Juratores convinci debeant, convinctantur per viginti quatuor Milites de eodem Comitatu, & infra eundem Comitatum

‘ coram Justiciariis nostris Itinerantibus in
 ‘ adventu eorum. Et mandatum est Vice-
 ‘ comiti *Kanc.* quodd prædictam Cartam in
 ‘ Comitatu suo legi & firmiter teneri faciat
 ‘ secundum quod Carta illa continet. Teste
 ‘ Rege apud *Westm.* undecimo die *Februarii.*’

And there went afterwards a Precept to the Sheriff to proclaim this Charter in the County Court.

Rot. Claus. 17 H. 3. m. 17.

‘ Rex concessit probis hominibus de Com.
 ‘ *Kanc.* quod loco magnarum Assisarum, quæ
 ‘ capi consueverunt per XII Milites, de Te-
 ‘ nementis quæ tenentur in Gavelykynd, inter
 ‘ Gavelykyndeis de cætero capiantur Juratæ
 ‘ per XII Homines Gavelykyndeis, sicut ple-
 ‘ nius continetur in Cartâ, quam Rex eis inde
 ‘ fieri fecit. Et mandatum est Vic. *Kanc.*
 ‘ quod prædictam Cartam in pleno Comitatu
 ‘ suo legi faciat & teneri. Teste Rege apud
 ‘ *Westm.* septimo die Novembris.’

A recent Grant of this Kind to the good Men of a County not incorporate, would be of little Effect; but in ancient Times such Grants were allowed good. However, the Validity of this Privilege depends not merely on the Charter, but is confirmed by the * Practice of the Courts of Law agreeable to the Grant. In *Bracton, lib. 5. c. 5. f. 332.*

Co. Litt. 3. a.

* 39 H. 3. *Itin. Kanc. Rot. 3, 4, 18. 25. in dorso,*
 & 55 H. 3. *Itin. Kanc. Rot. 28, 29, 51, 57. in dorso,*
 67. *in dorso.* Where the Entries are in this Manner;
 the

Book II.



f. 332. a. is the Writ to summon this Jury.
 ‘ Rex Vic. Salutem. Summoneas, &c. qua-
 ‘ tuor legales homines de Com. tuo, qui te-
 ‘ nent in Gavelkynd, quod sint coram Justi-
 ‘ ciariis nostris, &c. ad eligend’ super sacra-
 ‘ mentum suum XII de legalioribus homini-
 ‘ bus de Vicineto de, &c. qui teneant in
 ‘ Gavelkynd, & melius sciant, &c. ad facien-
 ‘ dam Juratam loco magnæ Assisæ provisam
 ‘ & concessam, &c.

And the Writ *de Pace*, or of Prohibition
 in a Writ of Right of Gavelkind Lands,
Reg. 7. b. takes Notice of this Method of
 Trial. ‘ Rex Vic. *Kanc.* Salutem. Prohi-
 ‘ bernus tibi ne teneas placitum quod est in
 ‘ Comitatu tuo inter *A.* petentem & *B.* te-
 ‘ nentem de tanto, &c. quod, &c. quia idem
 ‘ *B.* qui tenens est posuit se in *juratam loco*
 ‘ *magnæ Assisæ provisam & concessam*, & petit
 ‘ recognitionem, &c.

Whether Bat-
 tle may be
 waged in a
 Writ of Right
 of Gavelkind
 Lands.

But still there may be some Doubt, whe-
 ther the waging *Battle* in a Writ of Right
 brought for Gavelkind Lands be disallowed
 by the Custom; since there is no Grant of

the Tenant ‘ Ponit se in Juratam de Gavelykynde
 ‘ loco Magnæ Assisæ Domini R. provisam & concessam,
 ‘ & petit recognitionem fieri utrum majus jus, &c. Et

Jur’

Jur’

‘ *Radulphus le Franceys, Johannes de Hamme, Will’us*
 Jur’ Jur’

‘ *Castmer & Johannes de Leneton*, quatuor homines, qui
 ‘ tenent in Gavelykynde, veniunt & eligunt istos scil.

Jur’

‘ *Adam de Tvydale*, &c. (naming all the Twelve) qui
 ‘ dicunt super sacramentum suum, &c.

any

any such Privilege in the foregoing Charter of H. 3. on which the Claim is founded. Chap. VII.

And it is observable, that the Word *Battle* does not occur in the *Customal*, as printed by *Tottel*, nor in the Manuscript of *Lincoln's Inn*; but only *Ne soit prise Grande Assize*.

And in the above Writ *de Pace*. after the Words *Quod, &c.* are implied *idem A. clamat versus præd. B. per breve nostrum de recto, nisi duellum fuerit inde vadiatum*. And I have seen no less than six old Manuscript Copies of the Register (one of which is in *Lincoln's Inn* Library, and four others in that of the University of *Cambridge*) wherein this very Writ for Gavelkind Lands has the Words *Nisi duellum, &c.*

It is further remarkable, that one of the last Instances in our Books, of Battle joined in a Writ of Right, was between *Lowe* and *Co. Ent. 182.* *Kime* Demandants, and *Paramour* Tenant, for Lands in the Isle of *Harty* in *Kent*, which were Gavelkind, for the Title of the Tenant depended on the Alienation of an Infant. *Dyer 301.* Where is a pompous Account of the Ceremony preparatory to the Combat. And it is not to be doubted, but the Judges would have been well pleased to have ousted the Parties of this barbarous Method of Trial, had the Custom warranted them so to do, since the Example was so much disliked that Queen *Elizabeth* thought fit to interpose and accommodate the Matter. *Speed's Chronicle 1166.*

It

Of the Trial in a Writ of Right.

Book II.



It is true indeed, that by the Common Law, Battle does not lie in a Writ of Right *de Rationabili Parte*, or a *Nuper obiit* between Coparceners, because of the Privy of of Blood. *F. N. B.* 9 G. *Plow.* 306. which might possibly give Occasion to the other Opinion.

Whence the Jury ought to come for the Trial of any Custom of Kent.

Issues joined on any Custom of the County of Kent were, even before 4 *Ann. c.* 16. to have been tried by a Jury of the Body of the County; as appears by the Record formerly mentioned, p. 99. between *Beddyl* and *Crouther*, *Mich. 11 H. 8. B. R. Rot.* 88. Where the Issue being on the Custom of Kent, it is entered on the Roll, that the Court of B. R. before they awarded the *Venire* to the Sheriff to return the Jury, consulted with the Judges of the Common Pleas about the Matter of it, and then *because the said Issue touched and concerned the Commonalty of the County of Kent*, awarded the *Venire de Corpore Comitatus*.

And in this the Court seem to have imitated the ancient Practice of the Justices in *Eyre*, who on Questions concerning the Customs of this County often consulted (as the Records testify) * *totum Comitatum*; by which Expression may possibly be meant all those that were bound by the General Summons to give their Attendance on that Court; and who they were appears by the

* Ante 54, 64, 141, 194, 222. And if they made a false Presentment, they were fined. *V. Post* and *Stat. Westm.* 1. (3 Ed. 1.) c. 18.

Writ in *Bracton*, *Lib. 3. c. 11. pag. 109. b.* Chap. VII.

• Rex Vic. Salutem. Summoneas per bonos
 • Summonitores, omnes Archiepiscopos, E-
 • piscopos, Abbates, Priores, Comites, Baro-
 • nes, Milites, & liberè Tenentes de totâ
 • Balliva tua, & de quâlibet villâ quatuor le-
 • gales Homines & Præpositum, & de quolibet
 • Burgo duodecim legales Bûrgenses per to-
 • tam Ballivam tuam, & omnes illos, qui
 • coram Justiciariis Intinerantibus venire so-
 • lent & debent, quod sint apud talem locum
 • tali die, &c. coram dilectis, &c. quos Ju-
 • sticiarios nostros constituimus, audituri &
 • facturi præceptum nostrum.' And agree-
 ably to this Writ, it is claimed in the *Custu-*
mal of Kent, that the Comonalty of Gavelkind
 Men, who hold nothing but Tenements in
 Gavelkind, are not bound to come to the
 common Summons of the *Eyre*, but by the
 Borsholder and four Men of the Borough,
 except such *Towns* as ought to answer the
Eyre by twelve Men.

C H A P. VIII.

Of some Privileges relating to Gavelkind Lands in Kent, now obsolete.

Of Exemption
from serving
on Juries
in Attaints.

* Peramb.
568.

BY Statute 15 H. 6. 5. Persons were not to be compelled to serve on Inquests in Attaints, by Reason of Lands which they held of the Tenure of Gavelkind. But this was rather a Confirmation of an old Privilege under the Common Law, than (as Mr. *Lambard* * seems to imagine) a new Grant; for the *Venire* for the Trial of Issues in Attaints is for *Viginti quatuor Milites*, which can scarce comprehend Gavelkind Tenants. Indeed tho' the Writ be so, it seems the Sheriff may return Gentlemen, and call them Knights; and it is not traversable whether they be Knights, or no. *Bro. Droit.* 18.

But whether this was a Privilege by Common Law or Statute, is not material, it being now taken away by 18 H. 6. 2. which takes Notice of the Inconvenience occasioned by 15 H. 6. for that seeing within the County of *Kent* there were but thirty or forty Persons at most, who had any Lands or Tenements out of the Tenure of Gavelkind, because the greater Part of the said County, or well nigh all, was of the Tenure of Gavelkind, those Persons were to their great Impoverishment continually impanelled in
the

the said Actions; and therefore this Statute Chap. VIII.
 enacts, that those who have to their own Use, or to whose Use others have, twenty Pounds a Year of the Tenure of Gavelkind, should for the Future be returned and impanelled in all Attaints.

In 16 *Ed. 2. Fitzb Prescription, 52.* it is pleaded to be the Usage of Gavelkind, that no Man shall have Common in Land of that Nature. But, as Mr. *Lambard, Peramb. 629*, properly observes, the contrary is well known in *Kent* at this Day, and that in many Places. Of Common in Gavelkind Lands.

There was likewise another Custom, somewhat similar to the former, concerning Common in Gavelkind Lands in *Kent*, found by Verdict in the Case of *Thomas of Feverisham, 17 Ed. 2. Mayn. 08.* That notwithstanding a Man and his Ancestors, whose Estate he has, have Time out of Mind had Common in Gavelkind Lands, the Lord of the Soil may enclose at his Discretion, and hold it in Severalty. And in that Case Damages were given against the Commoner for destroying a Trench cast up by the Lord on such an Occasion. But I take the Usage to be contrary at this Day.

In *Fitzb. Prescription, 52.* above-mentioned, it is likewise pleaded to be the Usage in Gavelkind, that if a Man finds the Cattle of another doing Damage on his Land, he may lawfully enchain and drive them off without impounding them. Which Mr. *Lambard, Peramb. 629*. observes to be Of driving off Cattle found Damage-fesant on Gavelkind Lands.
 yet

Book II.



yet the Practice, though he thinks it directly contrary to the Rule of the Common Law.

But it is certain, this is not a Usage peculiar to Tenants in Gavelkind, but a Liberty, which the Common Law allows to every Man: And so it was in *Tyrringbam's Case*, 4 Rep. 38. b. resolved, as the Book says, without Difficulty, that when the Cattle of a Stranger come into a Man's Land, and do Trespass there, the Owner may, with a little Dog, chase them out, and shall not be compelled to distrain them *Damage feasant*. And the same Point is adjudged *Poph.* 161. in the Case of *Millen* and *Fandrye*.

Of the Lord's Right to the Trees in *Drovedennes*, by the Custom of Gavelkind. I have met with, on Record, a Custom of Gavelkind peculiar to the *Weald* of *Kent*, of which I find no Mention in any Book, viz. That the Lords of whom the *Drovedennes* in the *Weald* were holden in Gavelkind, should have all the great Oaks, Ash, and Beech growing in such *Drovedennes*, together with the Pannage thereof; and the Owners of the Soil, only the Underwood, or at most the Oak, Ash and Beech, under forty Years Growth: Which Custom may properly be introduced, and the Original thereof explained by Mr. *Somner's* Account of the Nature of these *Drovedennes*, being in Substance as follows:

Id. Lamb.

Peramb. 211.

The *Weald* of *Kent* was, for a great while, nothing but a Desert and unpeopled Wilderness, called *Silva Regalis*, as appertaining to the King, and acknowledging no private Lord

Lord or Proprietor: And it was usual in an- Chap. VIII.
 tient Royal Donations of Manors lying out of
 the *Weald*, to render the Grant more compleat
 by an additional Privilege of Common of Pan-
 nage [*i. e.* a Liberty of keeping and fattening
 Hogs with the Mast of the Trees] in one or
 more * *Dens* in the *Weald*. Which Term
Denne signified a woody Valley, or Place
 yielding both Covert and Feeding for Cattle,
 especially Swine: And these *Denns* set out for
 the Agistment of Hogs and other Drovers of
 Cattle, were thence called * *Drovedennes*, and
 he that had the Custody and driving of them
 to and fro, (the Hogherd or Neatherd) *Drof-*
mannus. And there is scarce an antient Grant
 in either the Church of *Canterbury's*, *St.*
Austin's, or *Rochester's* Registers, of any con-
 siderable Portion of Land, without the Addi-
 tion and Attendance of such a Liberty. *Somn.*
Roman Ports and Forts in Kent, p. 107. *ubi*
fusus. And it is probable these Grants con-
 veyed not only the Pannage, but the Property
 of the Trees themselves, the Lord being
 equally entitled to both, as appears by the
 following Records.

Trin. 7 Ed. 3. coram Rege. Rot. 55 Kanc.
 In an Action of Trespas brought by *James*
de Echyngham, against the Prior of *Christ-*
church, Canterbury, and others, for entring Trespas for
cutting
Trees, &c.

* *Vid. Somn. Sax. Dict.* under the Word *Drofdenne*;
 and his Treatise on Gavelkind 117. *Co. Litt. 4. b.* says,
Drofdan, Drufden, or Druden, signifies a Thicket of Wood
 in a Valley; for *Druf* or *Dru*, signifies a Thicket of
 Wood, and *Den* a Valley. It is called in *Domesday*, *Dena*
slwa; as see in *Spelm. Gloss.* under the Word *Dena*.

Book II.



The Defen-
dant pleads,
That the
Place where,
&c. is a
Drovedenn
holden of
him, and that
by the Cus-
tom of Ga-
velkind the
Lord is en-
titled to the
great Oaks,
Ash, and
Beech.

his Close at *Benynden*, and cutting down and carrying away his Trees, to wit, such a Number of Oaks, Ashes, and Beeches, which grew in the said Close; ‘*Quoad prædictas quercus, fraxinos & fagos, prædictus Prior dicit, quòd locus ubi, &c. vocatur Knolle, in quo loco est quidam Drovedenne, qui de ipso Priore immediatè tenetur, & dicit, quòd omnes Domini, de quibus les Drovedennes tenentur immediatè, juxta Consuetudinem patriæ de Gavelkynd habere debent, & a tempore quo, &c. habere consueverunt omnes grossas quercus, fraxinos, & fagos crescentes in Drovedennes; & Domini soli illorum Drovedennes subboscum in eisdem crescens habere debent, & habere consueverunt: Et quia prædictus Drovedenn apud Knolle de prædicto Priore immediatè tenetur, ipse prædictis die & anno, &c. secundum Consuetudinem patriæ usitatæ de Gavelkynd, eundem Drovedenn intravit, & grossas quercus, fraxinos & fagos in eodem crescentes, ut arbores suas proprias, in formâ prædicta succidit & asportavit, &c. prout ei bene licuit, &c.*

Plaintiff re-
plies *de inj.*
suâ, prop. &c.

‘*Et Jacobus dicit, quod prædictus Prior de injuriâ suâ propriâ arbores suas proprias in proprio solo crescentes, & non arbores ipsius Prioris, &c. modo quo idem Prior superius allegavit, &c. succidit, &c. Ideo veniat inde Jurata, &c.*

Issue.

Trespas for
cutting down
Trees, &c.

*Pasc. 44 Ed. 3. Coram Rege. Rot. 36. Kanc. ‘Thomas Bakere de Cranebrok attackiatus fuit ad respondendum Priori Ecclesiæ Christi Cantuar. de placito quare vi & armis clausum ipsius Prioris apud Crane-
‘ broke*

‘ broke fregit, & arbores suas ad valenciam Chap. VIII.
 ‘ viginti librarum succidit & asportavit, &
 ‘ alia enormia, &c. Et unde idem Prior
 ‘ queritur, &c.

‘ Et prædictus *Thomas* venit & defendit The Defen-
 ‘ vim, &c. & quoad fractionem clausi dicit, dant pleads,
 ‘ quod ipse in nullo est culpabilis. Et quoad That the
 ‘ succissionem arborum, &c. dicit, quod so- Place, where
 ‘ lum in quo, &c. est solum ipsius *Thomæ*, the Trees
 ‘ in quo solo ipse arbores prædictas succidit grew, was his
 ‘ & asportavit, sicut ei bene licuit, &c. unde own, &c.
 ‘ petit iudicium, &c.

‘ Et Prior, non cognoscendo solum præ- The Plaintiff
 ‘ dictum fore ejusdem *Thomæ*, dicit quod replies, That
 ‘ solum illud est quidam locus vocatus *Omen-* the Place is a
 ‘ *dennesbok*, infra dominium ipsius Prioris de *Drovedenne*;
 ‘ *Cranbrok*, & est *Drofdenne*, & in quo Lord, &c. and
 ‘ loco, & aliis locis, ubi *Drofdenne* est infra prescribes for
 ‘ dominium suum, ipse Prior & omnes Pre- all Oak and
 ‘ decessores sui, Priores Ecclesiæ Christi Can- Beech in the
 ‘ *tuar*. a tempore quo, &c. habuerunt, & *Drovedens*
 ‘ habere debent omnes hujusmodi *quercus* Lordship, to-
 ‘ & *fagos* in solo illo crescentes, pro volun- gether with
 ‘ tate suâ succidendi & asportandi, una cum the Pannage.
 ‘ *pannagio* inde proveniente, & nullus alius;
 ‘ & quod omnes tenentes in solo prædicto
 ‘ reddunt dicto Priori pro pannagio illo
 ‘ quendam annuum redditum; & ex quo
 ‘ dictus *Thomas* cognovit successionem & as-
 ‘ portationem arborum prædictarum, petit
 ‘ iudicium & damna sibi adjudicari, &c.

Afterwards the Defendant pleads, That
 he is but Tenant for Life of the Premisses,
 and prays in Aid of them in the Reversion;
 but they not appearing at the Day given,

Book II. *Consideratum est quodd prædictus Thomas solus respondeat.*

Defendant re-joins, that the owners of the Soil of the *Drovedens* are entitled to all the Trees under 40 Years Growth, &c. 'Et idem *Thomas* dicit, quodd Domini prædicti soli de *Drofdenne* habent, & habere debent omnimodas arbores de crescentia *quadraginta annorum* & *infra*, in solo illo crescentes; & dicit, quodd ipse est Dominus soli in quo. &c. in quo ipse *Thomas* succidit hujusmodi arbores de tali crescentia, &c. ad valentiam duodecim denariorum, sicut ei bene licuit; absq; hoc, quodd prædictus Prior hujusmodi arbores de tali crescentiâ ibidem habere debet; unde petit judicium, &c.

The Plaintiff says, That the Lord ought to have all Oak and Beech of whatsoever Growth, &c. 'Et prædictus Prior dicit, quodd ipse habere debet omnes *quercus* & *fagos*, cujuscunq; crescentiæ fuerint, in prædicto solo de *Drofdenne* crescentes, &c. & sic dicit, quodd prædictus *Thomas* de injuriâ suâ propriâ, &c. & hoc paratus est verificare per patriam, & prædictus *Thomas* similiter; Ideo veniat inde Jurata, &c.'

And this Right of the Lord to the Trees in the *Drovedennes*, together with the Pannage, is acknowledged in a Roll of Pleas, 3 Ed. 2. before *William Inge* and his Companions, Justices of Oyer and Terminer, specially appointed 'ad inquirendum per sacramentum proborum & legalium hominum de Com. *Kanc.* qui malefactores & pacis perturbatores arbores *Roberti Archiepiscopi Cantuariensis* apud *Hacbelwoldenne*, *Cranbrok*,' and many other Places in the *Weald*, 'succiderunt & asportaverunt.'

And

And *Walter Lucas* and others, (being presented on the Oaths of the Inquest for Trespases of that Nature) ‘attachiati fuerunt ad respondendum prædicto Archiepiscopo de prædicto placito; unde idem Archiepiscopus per attornatum, &c. queritur quod prædicti *Walterus* & alii (*such a Day and Tear*) arbores ipsius Archiepiscopi, viz. *quercus* & *fagos* ad valentiam quingenti librarum, &c. succiderunt & asportaverunt, &c.

Trespas by the Archb. of Cant. for cutting down his Oak and Beech, &c.

‘Et *Walterus* & alii veniunt, & defendunt vim & injuriam, &c. & benè cognoscunt, quod ipsi tenent terras & tenementa sua in prædicta Villa de *Hachelwoldenn* & *Mereden* de prædicto Archiepiscopo, & quod arbores in prædictis terris & tenementis crescentes, una cum proficuo Pannagii, ratione *Drovedenn* sunt ipsius Archiepiscopi, sed dicunt, quod nullas arbores in prædictis boscis succiderunt, nec aliquam transgressionem ei fecerunt; & de hoc ponunt se super patriam, & prædictus Archiepiscopus similiter, &c.’ And the Jury find them guilty of the Trespas, and assess the Damages.

The Defendants confess that they hold their Lands of the Archb. and that the Trees thereon are his by reason of *Drovedenn*; but plead, that they cut none down. Verdict for the Archb.

The following Pleadings are Part of the same Roll, and are a further Evidence that this Custom was looked upon as originally incident to Lands of the Nature of Gavelkind.

Nich. Aucher and *Bertram de Wylmynton* were in like Manner attached to answer the same Archbishop, for cutting down and carrying away his Trees growing in *Cranbrok*, *Hachelwoldenne*, *Rolvynden* and *Meredenn*, viz. *Quercus* & *fagos* ad val. quingenti librarum.

Trespas by the Archb. for cutting down his Oak and Beech.

Book II.

The Defendants plead, That the Lands where, &c. were formerly Gavelkind, but converted to Knight service by the Grant of a Predecessor of the Archbp's.

The Defendants plead, ' Quòd prædictus Archiepiscopus injuste queritur, &c. dicunt enim, quòd *Will'us de Cassingbame*, avus *Petronillæ* uxoris ipsius *Nicholai*, & *Benedictæ* uxoris prædicti *Bertrani*, quondam tenuit centum & viginti acras terræ cum pertinentiis in *Rolindenne* in *Gavelikend* de prædecessoribus ipsius Archiepiscopi: Et quòd *Sanctus Edmondus* quondam Archiepiscopus *Cantuar.* prædecessor prædicti Archiepiscopi, concessit prædicto *Will'mo de Cassingbame* prædictas centum & viginti acras terræ, quas de ipso Archiepiscopo tenebat prius in *Gavelykende*, quòd eas haberet & teneret sibi & hæredibus suis de ipso *Sancto Edmondo* Archiepiscopo, & successoribus suis, liberè & quietè per servitia vicesimæ partis feodi unius militis, & decem solidorum & duorum denariorum per annum, & quòd idem *Will'us* & hæredes sui haberent eandem libertatem in eadem terrâ, quam habent alii Milites de feodo Ecclesiæ *Christi Cantuar.* per quoddam scriptum, quod proferunt in hæc verba, &c.' Which Grant recites the Charter of King

Vid. ante § 2. *John* to *Hubert* Archbishop of *Canterbury*, empowering him and his Successors to change the Tenure of Lands holden of them from Gavelkind to Knight-Service, and then grants to *William de Cassingbame*, to the Effect above: ' Unde dicunt, quòd prædictus

And that since that Time the Owners of the Lands constantly felled the Trees. *Will'us de Casyngham*, post concessionem prædictam, totâ vitâ suâ arbores in prædictâ terrâ crescentes pro voluntate suâ succidit & asportavit: Et post mortem ejusdem *Will'i* quidam *Radulphus*, filius ejus, simili-
' liter

* liter succidit & prostravit pro voluntate suâ; Chap. VIII.
 * post cujus mortem ipsi *Nicholaus & Bertra-*
 * *nus*, ratione prædictarum *Petronilla & Be-*
 * *nedictæ* filiarum & hæredum prædicti *Ra-*
 * *dulphi*, quas duxerunt in uxores, similiter
 * succiderunt & prostraverunt, sicut eis benè
 * licuit; & quòd ipsi nullas arbores ipsius Ar-
 * chiepiscopi in prædictis centum & viginti
 * acris terræ, nec alibi, succiderunt nec as-
 * portaverunt: Et de hoc se ponunt super
 * patriam. Proferunt etiam quandam confir-
 * mationem Ecclesiæ *Cbristi Cantuar.* quæ
 * prædictam concessionem testatur.

* Et Archiepiscopus dicit, quòd ante præ- The Archbp:
 * dictam concessionem prædicti *Sancti Edmundi* replies, That
 * prædecessoris sui, & post, arbores in dictâ before and
 * terrâ crescentes semper fuerunt prædecesso- since the said
 * rum ipsius Archiepiscopi, & similiter suæ Grant the
 * prostrandæ pro voluntate suâ; absq; hoc, Trees there
 * quòd prædicti *Willus de Casynghame*, aut growing have
 * *Radulphus* filius ejus unquam aliquid de eis- been the
 * dem succiderunt, quousq; prædicti *Nicholaus* Archbishop's
 * & *Bertranus* de injuriâ suâ propriâ arbores and traverses,
 * ipsius *Roberti* Archiepiscopi, tam in præ- that the Ow-
 * dictis centum & viginti acris terræ, quàm ners of the
 * alibi crescentes vi & armis succiderunt & Land have
 * asportaverunt; & de hoc se ponit super pa- used to fell
 * triam: Et *Nicholaus* & alii similiter. them.
 Issue.

* Postea, &c. veniunt *JURATORES*, Verdict,
 * qui dicunt super sacramentum suum, quòd That the
 * *quercus* & *fagi* in prædictis centum & vi- Archbishops
 * ginti acris terræ *sunt arbores ipsius Archi-* have always
 * *episcopi*, & quòd ipse & prædecessores sui a felled the
 * tempore, cujus non extat memoria, prof- Trees with-
 * ternere solebant arbores in prædictâ terrâ out Let of
 * the Owners,

Book II.



And have
taken A-
mends for
any Trespafs
done to them,

And have
taken the
Pannage.

Judgment ac-
cordingly.

‘ crescentes, & vendere pro voluntate suâ,
‘ abfq; impedimento five calumpniâ præ-
‘ dictorum *Nicholai Petronille, Bertrani, &*
‘ *Benedictæ*, aut antecessorum suorum : Et si
‘ aliqua transgressio facta fuit in prædictis
‘ boscis per prædictos *Nicholaum & Bertra-*
‘ *num*, vel per quoscunq; alios, idem Archi-
‘ episcopus & prædecessores sui inde cepe-
‘ rit emendam : Et dicunt, quòd prædecef-
‘ sores ipsius Archiepiscopi, & ipse similiter,
‘ semper hucusq; percipere solebant, & ad-
‘ huc idem Archiepiscopus percipit medietatem
‘ totius *Pannagii* in boscis prædictis :
‘ Dicunt etiam, quòd prædictus *Nicholaus*,
‘ &c. sexaginta quercus & fagos, crescentes
‘ in prædictâ terrâ, vi & armis prostrave-
‘ runt, ad damnum ipsius Archiepiscopi cen-
‘ tum & decem librarum, &c.’ And there-
upon Judgment is given for the Arch-
bishop.

There remain indeed at this Day no Foot-
steps of this Right; the Reason whereof is
well accounted for by the following Passage
of Mr. *Somner*, from the Place above-cited.

Roman Ports,
&c. in Kent,
112.

In the Times of *Edward* the Third and
Richard the Second, the then Archbishops
of *Canterbury*, and the Prior and Convent
of *Christchurch* respectively, amongst other
like Lords and Owners of the *Wealdish Dens*,
finding themselves aggrieved by their Tenants
there and others, in cutting down and wasting
their Woods, which, on former Feoffments,
they had expressly reserved from their Tenants
to themselves (tho' it is more probable their
Title to them was from the above-men-
tioned

tioned Custom) in order to free themselves from further Care and Trouble in that Matter of the Wood, entered into a Composition with their Tenants; and for a new annual Rent of Assize over and above the former Services, by Indenture of Feoffment, (many of which relating to the Archbishop and Monks the Author had seen) made the Wood over to them in Perpetuity, either to be cut down, or left standing, at the Tenant's Choice. Ever since which Time the Interest of the Lord so compounding, has been gone as to the Wood itself, and nothing left but this Rent of Assize, together with the former Services.

And a Custom of a contrary Nature is set up at present in most Manors of, if not throughout the whole *Weald*, under the Name of * *Landpeerage*; whereby the Owners of the Lands on each side of the Highways, claim to exclude the Lord from the Property of the Soil of the Way, and of the Trees growing thereon.

* i. e. *Landownership*.

C H A P. IX.

Of Customs common to all Kentish Men.

HAVING now gone through the several Customs of Gavelkind, I shall, before I conclude, take Notice of some Customs claimed in our Books, or on Record, as the Right of all *Kentish* Men in general, and not particularly appropriated to Tenants in Gavelkind.

Whether there be a Custom for *Kentish* Fishermen to fix Stakes on the Shore.

In Trespass for digging the Plaintiff's Ground, the Defendant justified under a Custom, that all the Men of *Kent* have, Time out of Mind, when they fish in the Sea, used to dig in the Lands adjoining, to fix Stakes there for drying their Nets. And it was agreed, that by the Common Law those who fish in the Sea may justify coming upon the Land adjoining to the Sea; for such Fishery is for the publick Good, and for the Sustenance of all the Subjects of the Realm; But there was a Doubt in the Court, whether the Custom to dig was good, as being in Destruction of the Inheritance. 8 *Ed.* 4. 18. *b. Bro. Custom*, 46. The Case is not finally determined in the Book, but the Modern Practice may decide the Question against the Custom; for they who fix Stakes on the Shore betwixt high and low Water-marks, for the Use of their Kidel-Nets, now pay an Acknowledgment for the same to the Lord of the Manor.

8 *Ed.* 4.

8 *Ed. 4. 23. a.* It is pleaded to be the Custom of *Kent*, that when Enemies come to the Sea-Coast, it is lawful for all them of *Kent* to come on the Land adjoining to the Coasts, and there to raise Bulwarks for the Defence of the Country. But this is certainly the Common Law of the Realm; Necessity and the Safety of the Publick justifying the Damage done to private Property. 21 *H. 7. 27. b.* 12 *Rep. 12.*

Chap. IX.

Custom of
Kent to raise
Bulwarks in
alieno solo a-
gainst Ene-
mies.

In the seventh Year of *Edw. 3.* before the Presentment of *Engleschire* was taken away by Statute, and when the Law required, for the Safety of Foreigners, that every Person slain should be proved by his Relations to have been of *English* Birth, otherwise the Country were amerced for his Death, if the Murderer were not taken in due Time; the County of *Kent* claimed before the Justices in *Eyre*, to be exempt from the Peril of this Law; but because this Claim was notoriously false they were fined for it. *Itin. Kanc. 7 Ed. 3. Plac. Coron. Rot. 1. in principio.* ‘*TOTUS COMITATUS præsentat, quòd nulla *Englescheria* præsentatur in Comitatu isto: Et quia comper- tum est per Rotulos ultimi Itineris, & etiam per Rotulos de aliis Itineribus præcedentibus, quòd *Englescheria* præsentatur in Comitatu isto de Feloniis tantum, & hoc de masculis, & per duos ex parte patris vel matris, ad judicium de TOTO COMITATU.’ But even this seems dif-

Of *Engle-*
schire.
Vide *Stat.*
14 *Ed. 3.*

* For the Signification of this Expression, see before 260.

Book II.



ferent from what it was in several other Counties; for *Bracton* says, *in quibusdam Com. presentatur Englescheria, siue mortuus fuerit masculus, siue foemina, per duos masculos ex parte patris, & per duas feminas ex parte matris, &c.* Lib. 3. c. 15. p. 135.

Kentish Men
exempt from
Villinage.
Lamb. Per-
amb. 9.

The *Kentish Customal* claims, that the Bodies of all *Kentish Men* be free, as well as the other Free Bodies of *England*: Which was formerly, while many of the Subjects of this Kingdom remained under a State of hereditary Bondage, a most glorious and valuable Birth-right. And the Claim appears to be well founded by 30 *Ed. 1. Fitzb. Villenage*, 46. In a Writ of *Niefse*, the Defendant pleaded, that she was free; and the Jury found, that the Father of the Defendant was born in *Kent*; whereupon, without further Inquiry, the Court gave Judgment that she was free, for that there were no Villeins in *Kent*. But though it was sufficient for a Man in order to avoid the Objection of Bondage, to say that his Father was born in *Kent*; yet *Mr. Lambard* ⁶²⁸/₃₈₇, doubts whether it would serve in that Case to say only, that he himself was born in that County. But that Doubt is resolved by 7 *H. 6. 33. a.* Where it is said, that in the County of *Kent*, they have a Custom that every one born within the County shall be free, notwithstanding his Father was a Villein; and *Martin Justice* answers, that this is by Parliament, and a Statute made for that Purpose. And it is the more probable this Privilege might have such Commencement, because *Mr. Somner* has shewn beyond Contradiction

dition by several ancient Records, &c. that there have been Villeins in Kent since the Conquest. Chap. IX.

There remains another Privilege formerly claimed by the Men of Kent, redounding so much to the Honour of our County, that I cannot pass it over in silence, though possibly not altogether proper for a Treatise of this Nature: It is that of being placed in the Van-guard of the King's Army. Which Right, together with the Occasion of it, is taken Notice of by an Author who wrote about the Time of Hen. II. ' * *Enodus quantâ virtute Anglorum, Dacos, Danesq; fregerit, motusq; compescuerit Noricorum, vel ex eo perspicuum est, quod ob egregiæ virtutis meritum, quam ibidem potenter & patienter exercuit Cantia nostra, primæ cohortis honorem, & primos congressus hostium, usq; in hodiernum diem in omnibus præliis obtinet.* ' *Joannis Sarisburiensis Policraticus, Lib. 6. c. 18.* And Camden in his *Britannia*, under Kent, from an ancient Monk † bears Testimony of the same Right. The Right of the Kentish to be placed in the Van-guard of the King's Battle.

Indeed the Disuse of the ancient Method of leading forth the Forces of this Kingdom according to their Counties, has caused a long Suspension of the Kentish Men's Right of

† *Gervase. Lamb. Pet. amb. 14.*

* Others read *Cinidus*; Mr. Selden, in his Notes on Drayton's *Polyolbion ad finem*, thinks it should be *Cnudus* for King *Cnute*; but (with great Deference to him) that is repugnant to the Sense. I imagine it should be *Edmundus* (for *Edm. Ironside*, *Canute's* Antagonist) written in the old contracted manner *Ed^mdus*.

being

Book II.



being marshalled in the Front of the Battle: But whether, if future Times should revive the old Order, they may not still be entitled to their former Prerogative, I leave to the Decision of the Gentlemen of the College of Arms, as a Matter improper to be determined by one of a peaceful Profession; and hope I have done sufficient in continuing my Countrymen's Claim: But as the Honour is attended with some Danger, it may possibly be yielded to them without Dispute.

It is on Account of these two last mentioned Privileges that the Poet *Drayton* bestows this honourable *Elogium* on our County,

Polyalbion,
Canto 18.

Of all the English Shires be thou surnam'd
(the FREE,
And FOREMOST ever plac'd, when they
(shall reckon'd be.

THE

Various
Readings in
Tottel's Edition,
1556.

* T H E

Various
Readings in
the M.S. of
Lincoln's Inn.

Customal of *KENT*;

From Mr. *Lambard's* Copy, with his
Translation.

The Title is
Consuetudines
Kancie.

Et les Cu-
stoms omitted.

The Title is
Constitutiones
Kanc.

Et les Cu-
stoms omitted.

These are the Usages, and Customs, the
Ces sont les vsages, & les custumes, les*

which the comunalty of Kent, claimeth to
ques le comunaute de Kent, clement

have

* As I have subjoined this *Customal* to my own Work, it may possibly be expected that I should say something concerning the Nature and Authority of it; especially as the Latter has been attacked by Sir *Henry Spelman*, who in his *Treatise of Feuds*, c. 14. says that there are such Differences between *Tottel's* and *Lambard's* Copies, that both their Authorities may be questioned. But what foundation there is for this Assertion, is left to the Judgment of the Reader, on the View of those Differences, which are here noted in the Margin.

I have not been negligent in my Endeavours to find out whether this *Customal* be any where on Record. Mr. *Lambard's* Copy mentions that the Usages therein contained were allowed in *Eyre*, in the 21st Year of *Ed. 1*. It happens that the Records of that *Iter* are perfectly preserved, and I have perused them all, viz. the Chief Justice's (*Berewicke*) Roll, the *Rex* Roll, the Roll of the Pleas of the Crown, and the *Quo Warranto* Roll, but there is no such Record among them, nor among those of any other *Iter*; And the Language of the *Customal* being different from that wherein the Proceedings before those Justices were Recorded, (which were ever
in

have in the Tenements of Gabelkind, &
 aucr en tenementz de Gauylekende, e
 in

in *Latin*,) leaves us little Reason to believe that it had it's Original there.

Lord Coke gives it the high Appellation of *Statutum de Consuetudinibus Kancie*, but, it seems, on no other Foundation, than that it is sometimes to be met with in old Collections of Statutes, as are many other Matters which were never enacted by Authority of Parliament, and is so Printed by *Tottel*; for I have examined the Parliament Rolls of the 21st Year of *Ed. 1.* (of which date the *Customal* appears to be by the Conclusion) and those of the preceding and subsequent Years, being much the same as are published by *Ryley*, under the Name of *Placita Parliamentaria*, and it does not occur there.

I then hoped to have found it at the *Tower*, but on Enquiry was informed, that there was no such Record in that Office.

I have notwithstanding little Reason to lament my Search, since it first brought me to the Knowledge of those Records of the *Kentish Iters*, which are inserted in this Book, and going to almost every Point of our Customs take away in a great Measure, the Necessity of Authenticating the *Customal*; which I imagine rather to have been a private Collection of such Things as had been found *per totum Comitatum*, or were otherwise known to be the Custom of *Kent*, than a Record of a publick Nature: And the Words of Mr. *Lambard's* Copy, that these Customs were allowed before the Justices in *Eyre* in the 21st *Ed. 1.* seem to favour a Conjecture that they might be extracted by Command of those Judges, from the Records of their Predecessors, for the Information of their own and future Times.

However, thus much may be said for the present Authority of the *Customal*, whether Authentick in its Original, or not, that it has received such a Sanction from its Antiquity, as to have been admitted in Evidence to a Jury, even from Mr. *Lambard's* Copy.

* *Vide ante*,
 p. 260.

*Lannder and
 Brookes, Cro.
 Car. 562.*

Various Readings in Tottel's Edit.
* The Words between the Stars omitted.

in the Men of Gavelkinde, * allowed in Various
en gentz Gauilekendeys, * allowes en Readings
Eire before John of Berwikke, & his com- M.S. Linc.
Eire John de Berewicke, e ses com- Inn.
panions, the Justices in Eire in Kent, * The Words
pagnions, Justices en Eire, en Kent between the
the 21. yeere of King E. the Sonne of Stars, and
le 21. an le Roy Ed. fiz. le likewise the
King Henrie. * That is to say, that all following
le 21. an le Roy Ed. fiz. le Words Cesta-

* Les Corps Gavelkindes.

savoir que
Roy Henrie. * Cesta scavoir, que toutes^a toutes les cors
de Kenteyes,
the bodies of Kentishmen be free, as well are omitted,
les cors de Kenteyes scyent francz, auxi come and the Sen-
ss the other free bodies of Englande. tence begins
les autres fraunz cors Dengleterre. Soient frankz,
&c.

b The whole Passage concerning the Escheator omitted.

* And that they ought not the Escheator
Et que ilz ne duiuent le eschetour
of the King to chuse, nor eber in any time
le Roy elire, ne vnkes en nul temps

* The whole Passage concerning the Escheator omitted.

did they: But the King shall take, or cause
ne fesoint, mes le Roy prengne, ou face
to be taken, such an one as it shall please
prendre, tiel come luy plerra,
him, to serbe him in that which shall be
de ceo qui soit mistier a luy

needful. And that they may their landes
seruir. Et quilz puent lour terres

* Doner ou Vender.

and there tenements gibe and sell, with
Et lour tenementz c * doner Et vender, * Doner ou
out licence asked of their Lordes: Sa- Vender,
saunz conge demaunder a lour seignorages:

ving unto the Lordes the rents and the
sauues a seignorages les rentz. e les
U services

Various *serbices due out of the same tenements.* Various
 Readings in *services dues des mesmes le tenementz.* Readings
Tottel's Edit. *M.S. Linc.*

And that all, and every of them, may by *inn.*

Et que touz, e chescun, puseit per

loit of the King, or by plaint, plede for
 a A on droit. *Bre' le Roy, ou per pleynt, pleder pur* * * A son droit.

the obtaining of their right, as wel of their
 b Desouth. *leur droit purchaser, auxibien* b † *de leur* † Desouz.

Lordes, as of other men. And they
Seignerages, come des autres geniz. Et

claime also, that the communalte of
 c Auxibiende *clament* c *auxi, que la Commune de*

la common-
 aunce de la
 Gavelkinde. *Gabelkindmen, which hold none other than*
Gauylekendaes, que ne tenent mes que

tenements of Gabelkinde nature. ought not
tenemenz Gauylekendaes, ne deuent

to come to the common Summonce of the
venir a la commune Somonse del

Eire, but onely by the Bozholder, and
Eire, mes ke per Borgefaldre, &

four men of the Bozowe: except the
iiij. hommes * *de la Borgbe: hors prisles* The Words
 between the
 townes which ought to aunswere by twelbe
 Stars omit-
villees que deuent responder per xij. ted.

men in the Eire. And they claime also
hommes * *en le Eire. Et clament auxi,*

that if any tenant in Gabelkind be at-
que fil nul tenant en Gauylekend seit at-

taunted of felonie, for the which he suffereth
teint de felonie, per que il fuffre
 execution

Various
Readings in
Tottel's Edit.

execution of death, the King shall have all
† luyse * de mort, eit le Roy touz ses

Various
Readings
M.S. Linc.

† Fuise.

his goods, & his heire forthwith after his
chateux, e son eir maintenant apres sa † lues.

death shall be inheritable to all his landes &
mort seit enberite de touz ses terres &

tenements which he held in Gabelkinde in
tenemenz, que il tient en Gaulekende en

fee, & in inheritance: & he shall hold them
fee, e en heritage: e les tiendra

by the same services & customes, as his
per mesmes les services et customes, sicome

auncelors held them: whereupon it is said
ses auncestres les tyndront: dont est dit

in Kentish: the father to the bough, and

* Sonde the
Father to the
Bough, Sond
the Sonne to
the Plough.

en Kenteis * he faderto be bough, and

* Son the Fa-
der to the
Bonde, Son
the Son to
the Londe.

the sonne to the plough. And if he have a
he son to be plough. Et si il eit

wife, forthwith be she endowed by the
femme, maintenant seit dowe per le



heire, (if he be of Age) of the one halfe of all

b Sil soit del
Age a aver &
tener solonc le
fourme a-

beir, b † si seit dage, de la meytie, de touz
the landes & tenements which her husband
les terres e tenemenz que son Baroun

† Sile' soit
dage a aver &
tenir solonc le
fourme a-

vaunt dit. Et
deceles terres
le Roy, &c.

held of Gabelkind nature in fee, to have
tint de Gaulekend en fee, a aver

vaunt dit. Et
de celes terris
le Roy, &c.

(but falsely).

& to hold according to the forme hereafter
e a tener solonc la fourme de

(but falsely).

declared. And of such lands the King
suthdye. Et de tiels terres le Roy

U 2

shall

* Perhaps it should be *Justice de mort*, for it will be difficult to fix
the true Signification of any of the other Words.

Various
Readings in
Fotell's Edit.

shall not have the yeere, nor waft, but only
ne auera An ne waft, mes tant foulment Various
Readings
M.S. Lin.

the goods, as is befoze said. And if any
les chateaux, sicome il est auant dit. Et si Inn.

man of Gabelkind, either for felonie, or
nul Gauylekendeis pur felonie, ou

for suspition of felonie, withdraw him out
pur Ret de felonie, se suthbrei de la

a Peace. of the country, & be demanded in the
a pees, e seit en counte demande

countie as he ought, & be afterward vt-
com il appent, e puis vt-

lawed: or put himsele into the holy
lagbe: ou fil se met en seinte

b Oue le
Reaume, o-
mitted.

church, & abjure the land & the realme,
*eglise, et foriure la terre b * oue le Reaume,*

* The Words

the King shall have the yeere & the waft of
le Roy auera lan e le waft c + de

oue le
Reaume, o-
mitted.

c De ses tene-
mentes e de

ses terres, ceo
que de luy sont
tenus, ensem-

blement, &c.
(but falsely.)

his landes and of all his tenements, to-
ces terres, & de touz ses tenemenz,

+ De ces tene-
mentz et de
ces terres, ceo

gether with all his goodes and chattels:
ensemblement oue touz ces chateaux,

que de lui sont
tenus, ensem-
blement, &c.
(but falsely.)

So that after the yeere and the day, the
issint que apres lan, e le iour, le plus

next Lord, or Lordes, shall have their
procheyn Seig. ou Seigneurs, eyent leur

Eschetes of those landes and tenements,
Eschetes de celes terres e tenemenz,

every Lord that, which is immediately
chescun Seigneur ceo, que de luy est tenu
holden

Various holden of him. And they claime also, that Various
Readings in *sans men.* * *Et clament auxi, que* Readings in
Tostel's Edit. *M.S. Linc.*

if any tenant in Gabelkinde die, and be *Inn.*
si ascun tenant en gauylekende murt, et

an inheritour of landes and tenements in
seit inherite de terres e de tenemenz de

Gabelkinde, that all his sons shall part
Gauylekende, que touz ses fitz partent

* Mr. Sommer, p. 170. gives us from an ancient Copy of the *Customal*, formerly Registred in a Book belonging to the Abbey of St. *Austin*, Canterbury, another Clause, following the Words, *est de lui tenu sans men, viz. E si home ou femme seit feloun de sei mesmes, que ii sey mesmes de gre se ocye, le Roy aura le chatteux tuts, & nient le an ne le waste, mes le heir seit tantet enberite sans contredit, kar tout seit il feloun de sey mesmes il neyt my atteint de felonye.* Thus in *English*, *And if a Man or Woman shall be a Felon of him or herself, who shall kill him or herself, of his or her own Accord, the King shall have all the Chattels, and not the Year nor the Waste, but the Heir shall immediately inherit without contradiction, for tho' he or she be a Felon of him or herself, he or she is not attainted of Felony.* This has been omitted in later Copies (as I suppose) because no other than the Common Law. But I chose to take notice of it, because I have found it to have been formerly disputed whether one *Felo de se* did not forfeit his Lands by the Custom of *Kent*.

For in 55 H. 3. *Itin. Canc. rot. 34. in dorso*, In bar of an Assize it is pleaded that the Father of the Plaintiff *fecit Feloniam de se*, and that the Custom of *Kent* is such, that if a Man *faciat Feloniam de se*, his Sons can claim nothing in any Land whereof he died seised, nor his Wife her dower, & *petit quod inquiratur per viros legales de Comitatu. Postea Totus Comitatus recordatur quod ille, qui facit Feloniam de se, non forisfacit terram suam.* And thereupon the Plaintiff has Judgment to recover his Seisin.

Various
Readings in
Tottel's Edit.

that inheritance by equall portions. And Various
cel heritage per ouele porcioun. Et Readings in
M.S. Linc.
if there be no heire male, let the partition
Inn.

• Partition. *si nul heir madle ne seit, seit la^a * partye* * Partition.

be made between the females, eben as be-
seit entre les females sicome entres les
tween brothers. And let the messuage also
freres. Et la mesuage

be departed between them: but the harch
seit autre ci entre eux departi, mes le

for fire shall remain to the youngest sonne,

^b *Ou al punee* *astre demorra al pune,* ^b † † The Words
omitted. *ou al punee* omitted.

or daughter: And be the value thereof
ou al punee, e la value seite de ceo

delivered to each of the parceners of that
liure a chescun des parceners de cel

• *Piece del.* heritage, from xl. feete from that Aſtre,
heritage a xl. ^c pes de cel Aſtre,

if the tenement will so suffer. And then
si le tenement le peut souffrir. Et donkz

let the eldest brother have the first choice,
^d *Frere, cmit-* *le eyne^d § frere eit la primere eleſtioun,* § Frere, omit-
ted. ted.

§ and the others afterward, according to
e les autres apres per degree.

their degree. Likewise of houses which
Enſement de meſons que

shall be found in such Messuages, let them
^e *Enſes mains,* *ferront trouels^c ** en lieus meſuages, ſeient* ** En ſes
foient parties meſons ſoient
enter, &c. parties enter,
&c.

be departed amongst the heires by equall
departye entre les heirs per ouele

portions, that is to weete, by foote if
porcioun, Ceo est aſauoir per peies ſil
need

Various
Readings in
Tottel's Edit.

need be, **Saving the Couert of the Aſtre,** Various
eſt miſtier, Sauue le couert del Aſtre Readings
M.S. Linc.
which ſhall remaine to the yongeſt ſon, *Inn.*

que remeynt al pune, ou al punee
or daughter, as is befoze ſaid: **So ne-**
ſicome il eſt auandist, iſſi que ne-
bertheleſs, that the yongeſt make reaſonable
quedont que le pune face * **renable** * **Reſonable.**

* **Reaſonable.**

amends to his parceners for the part which
gre a ces parceners de la partye que
to them belongeth, by the award of good
a eux appent per agard de bone
men. And of the aforeſaid tenementz
gentz. E des auaunditz tenemenz
whereof one only ſuit was wont to be
dont vn ſoule Sute tant ſoulement ſoleit
made befoze time, be there not by reaſon
eſtre ſeit auant, ne ſeit per la reſoun
of the partition but one ſole ſuite made,
de la ^b *partye* *fors vn ſoule ſute faite*
as it was befoze accuſtomed: But yet let all
ſicome ſoleit auant, mes que touz
the parceners make contribution to the
les parceners facent contribution na
parcener which maketh the ſuite for them.
celui que face la ſute pur eux.

^b **Particjon.**

In like ſort let the goods of **Gauelkinde**
Enſement ſeient les chateus de Gauyleken-
persons be parted into three parts, after
deys parties en treis apres le
the funerals & the debts paid, if there
exequies e les dettes rendues, ſi il y

Various
Readings in
Fottel's Edit.

be lawfull issue in life : So that the dead
cit issue mulier en vye, issi que la mort

Various
Readings in
M.S. Linc.
Inn.

^a The Words
e les filles o-
mitted.

have one part, and his lawfull sonnes and
*eyt la vne partie, e les fiz^a * e les filles*

^a The Word
e les filles
omitted.
† Femme en
vie-la tierce
parte.

daughters an other part, and the wife the
muliers lautre partie, et la † femme la
third part. And if there be no lawfull
*tierce partie. * Et si nul issue mulier*

The Words
between the
Stars are
omitted.

issue in life, let the dead have the one halfe,
en vie ne seit, cit la mort la meite,

^b Partic.

and the wifz alibe the other halfe. And
*e la femme en vye lautre^b meytie *.* Et

if the heire, or heires, shall be under the
si le beir, ou lez beirs, seit, ou jeyent de
age of 15 yeers, let the nourtriture of them be
deins le age de xv. ans, seit la nouriture de

^c The Words
per le Seigneur
omitted.

committed by the Lorde, to the next of the
eux baille^c § per le Seig. al plus procheyn
bloud to whom the inheritaunce can not
del sank, a qui heritage ne peut

[§] The Words
per le Seigneur
omitted.

descend. So that the Lord take nothing for
descendre, issi que le Seign. pur le^d bail
the committing thereof. And let not the
rein ne prengue. Et quil ne

^e Son.

heire be married by the Lorde, but by his
*seit marie per^e ** le Seign. mes per sa^{**} Son.*

owne will, and by the aduise of his friends,
volunte demeine, & per le conseil de ces amys
if he will. And when such heire, or heires,
sil veut. Et quant cel beir, ou ceux beirs

shall come to the full age of fifteen yeers,
sont de plener age de 15 anns
let

Various
Readings in
Tottel's Edit.

let these lands and tenements be delivered
seient a eux leur terres, e leur tenemenz
unto them, together with their goods, and
livres, ensemblement oue leur chateaux, et

Various
Readings in
M.S. Liac.
Irr.

Profits

with the improvements of the same lands,
*oue les a * enprowemenz de celes terres*
remaining above their reasonable sustenance ;

* Approwe-
mentz.

b Raifonable.

oultre b † renable sustinance :

† Resonable.

of the which profits & goods, let him be
de quel enprouement, e chateaux,

bounde to make aunswere which had the

c Lui avera
en noriture,
au qui le
Seygmour et
ses heyres cel
nouriture
avera baillie.

seit tenu a respondre celui qui de c § luy

§ Lui avera en
noreturonke
Seignour et
ses heirs cele
noreture ave-
ra baillie.

education of the heire, or els the Lord,
auera la noriture, ou le Seigneur

or his heires, which committed the same
ou ses beires que cel noriture auera

education. And this is to be understood,
baillie. Et ceo fet a sauoir

that from such time as those heires in Ga-
que del boure que ceux heirs Ga-

d Averont
passe.

belkind, be of, or have passed, the age of
uylekende d † seient, ou ount passe le age de*

* † Averont
passe.

fifteen yeres, it is lawfull for them, their
xv. auns, list a eux leur

e Doner ou
vender.

lands or tenements, to give and sell at their
*terres ou tenemenz e † * doner e vendre a*

† * Doner ou
Vendre.

pleasure : Saving the services to the
leur volunte, Sauues les services au

f Lour.

chief Lordes, as is besoye said. And if
f * chefz seignorages com il est deuant dit. ** Lour.*

any such tenant in Gauekind die, and
Et si nul tiel tenant en Gauylekend meurt,
have

Various
Readings in
Fottel's Edit.

habe a wiſſe that oberliſbeth him, let that
e eit femme que ſuruiue, ſeit cele Various
Readings in
M.S. Linc.
Iuu.

wiſſe by and by be endowmed (of the one
femme maintenant douwe de la meite

halfe of the tenements whereof her Huſband
des tenementz dont ſon baroun

died beſſed and ſeiſſed) by the heires, if
moruſt * *veſtu e ſeiſi, per les heirs ſil*

* The Words
veſtu e omit-
ted.

they be of age, or by the Lords, if the
*ſeient de age, * ou per les Seigneurs ſi les*

* The Words
veſtu e omit-
ted.

heires be not of age : So that ſhe may have
*heirs ne ſeint pas de age. * iſſi que ele eyt*

the one halfe moitie of thoſe lands and tene-
la meite de celes terres e tenemenz,

The Words
between the
Stars omitted.

ments, to holde ſo long as ſhe keepeth her a

b Et tiendra
tant come ele
ſe tient veu-
ſue ou defen-
ſantee, de
enfant ſoit
attaint, &c.

a tener tant com ele ſe tyent veue,

widow, or ſhall be attainied of childbirth,
ou de enſanter ſeit atteint

after the ancient uſage : that is to ſay,
per le auncienne uſage, ceo eſt aſaucir,

that if when ſhe is delibered of childe, the
que quant ele enſaute, e

infant be heard crie, and that the hue and
lenfant ſeit cy crier, c† E que le bu e le

c Et le crie
ſoit leve, e
la pais ſe en-
ſemble, &c.

crie be raiſed, and the countrie be aſſembled
cry ſeit leue e le pais enſemble,

† Et la crie
ſoit leve, &
la pais ſe en-
ſemble, &c.

and have the view of the childe ſo bozne,
e eyent weue de lenfant enſi faunte,

and of the mother, then let her loſe her
e de la mere, adonks perde ſon

Dowre wholly, and otherwiſe not, ſo long as
Dowere enterement, e autrement nyent,
the

Various Readings in Fottel's Edit. the holdeth her a widow: whereof it is Various Readings in M.S. Linc.
tant come ele se tient veue; dont il est

Said in Kentish: he that doth wende her Inn.
* Sey is wedne dist en Kenteis: * * je pat hip pende * Seye is
seyis levedne. wedne, seye
ys lenedy.

let him lende her, And they claime also,
je hip lende. E clament auxi,

that if a man take a wiffe which hath in-
que homme que prent, femme, que eit be-

heritance of Gavelkind, and the wiffe di-
ritage de Gauylekend, e la femme mur-

eth befoze him, let the husband have the one
ge auant luy, eit le Baroun le meite

halle of those lands and tenements whereof
de celes terres et tenemenz, tant come

he died seised so long as he holdeth him
il se tient b veuers (dont c + il morust + El.
b Venfuer. c El.

a widower, without doing any Strippe,
seisei) saunz estrepement,

oz waste, oz banishment, whether there
ou wast, ou exile fere, le quel kil y eit

were issue between them oz no: And if he
beir entre eux ou noun. Et fil

take another wiffe, let him loose all.
prent femme, trestout perde.

And if any tenement of Gavelkinde
Et si nul tenement de Gauylekend

do escheate (and that escheate be to any
eschete (Et ceo eschete a nul

Lozde which holdeth by fee of Hawberke,
Seigneur que tiene per fee de hawberk,
oz

Various Readings in Fossel's Edit.	or by Sericauncie) by death, or by Gavelate ou per sericauncye)*per mort, ou per Gave-	Cessabit Various Readings in M.S. Linc. 4 th .
The Words between the Starsomitted.	as is hereafter saide, or be to him late sicome il est subdite, * ou li seit giben up	The Words between the Starsomitted.
	rendred by his tennaunt which befoze held rendu de son tenant que de li auant	
	it of him by quite claime thereof made, or le tynt per quite clamaunce de ceo fete, ou	
* Gavelet.	if his escheate be by Gavelate as is here-seit sa eschete per * * Gavelate sicome il	* Gavtlete.
	after saide, let this land remain to the est de subdit remeyne cele terre as	
	heires unpartable: And this is to be un-	
b Non portables.	peirs b † impartable. Et ceo fet asauoir,	† Noun portables.
	derstood, where the tenant so rendring, la ou le tenant enfi rendant,	
	doth reteine no seruice to himselte, but nule seruice retent devers sey, * sauuet	
The Words between the Starsomitted.	saueith nevertlesse to the other Lordes nequedent as autres Seigneurages	The Words between the Stars are omitted.
	their fees, fermes, and the rents wherewith fees, fermes e les rentes dont les	
	the aforesaid tenements of Gavelkind auant diz tenemenz de Gauylekende	
	(so rendred) were befoze charged, by him, ensirendus auant furent charges per ceux,	
	or them, which might charge them. ou per celui, que le charger poent, ou poeyt*.	
	And they claime also, that if E clament auxi, que si nul tenant	
	any tenant in Gavelkind reteine his en Gauylekende reteine sa	
	rent,	

Various
Readings in
Tottel's Edit.

rent, and his seruices of the tenement which Various
rent, e son seruice del tenement quil Readings in
M.S. Linc.

he holdeth of his Lord, let the Lord seeke by Inn.
tient de son Seigneur, querge le Seig.

the award of his Court from threeweekes
per agard de sa court de treys semeynes

to threeweekes, to finde some distresse upon
en treys semeynes true destresse sur

that tenement, untill the fourth court,
cel tenement tant que a la quart court,

alwaies with witness: And if within
a toteset per tesmoynage, Et si dedens

that time he can finde no distresse in that
cel temps ne trusse destresse en cel

tenement, whereby he may have iustice of
tenement per queux il puisse son tenant

his tenant, Then at the fourth court let it
iustiser, Donc a la quart court seit

be awarded, that he shall take tenement
agard, quil pregne cel tenement

into his hande, in the name of a distresse,
en sa mein en noum de destress,

as if it were an oxe, or a colt, & let him
aufi come boef ou vacche, e le tiene

keepe it a yeere, and a day, in his hand
un an, e un iour en sa mein

without manuring it: within which terme,

* Sans mein-
our.

* *sance meyn ouerir: dens quel terme,* * Sanz main-
nour.

if the tennaunt come, and pay his arrerages,
fi le tenant vent, e rend ses arrerages,

* Face rai-
sonables a-
mendes de la
dette.

and make reasonable amends for the
e fait renables amendes + de la

+ De la dette.
with.

Various **Withholding,** Then let him have & enjoy Various
 Readings in *detenue,* *a donc eit,* *e ioise* Readings in
Fottel's Edit. *M.S. Linc.*

his tenement as his auncestors and he be= *Inn.*

• *Lesteignont.* *son tenement sicom ses auncestors* * * *e ly* * *Les tenoi-*
ent.

foze held it. And if he do not come be=
 • *Dedeyns.* *auant le tyndront. Et fil ne vent* b † *deu* † *Dedeins.*

foze the peere, and the day past, then let
 • *Eyt.* *ant lan, e le iour passe, donc* c § *auge* § *Aille.*

the Lord go to the next countie court with
 • *Courte* (but *le Seigneur al procbein* d *Counte suiunt*
falsely.)

the witnesses of his owne court, & pro=
oue tesmoynage de sa court, e face la

nounce there this proesse, to haue further
pronuncier cel proces pur tesmoynage

witnesse. And by the award of his court
auer : *Et per agard de sa court,*

(after that countie court holden) he shall
 • *Court.* *apres ceo* ° *Counte tenue, entra*

enter, and manure in those lands and
 • *Mainera.* *e* f * † *meynouera en celes terres* e * † *Meignera.*

tenements, as in his own demeanes.
tenemenz, sicome en son demeyne.

And if the tenant come afterward, and will
Et si le tenant vent apres, e

rehaue his tenements, and hold them as
voile ces tenemenz reauer e tener sicome

he did befoze, let him make agreement with
il fist devant, face gree al

the Lord according as it is anciently said,
Seigneur, sicome il est auncienment dist,

* *Nezhe*

Various
Readings in
Tottel's Edit.

* Neȝhe rype ſelde and neȝ he ryp
zelde: And fiſ pond pon þe pepe, eþ he bi-
come healþen.

Various
Readings in
M.S. Linc.
Inn.

* *The Words*

Auſſi il cley-
ment omitted,
and the Sen-
tence runs
thus, Ne per
pueur del
Seignour ne
des Baillifes
encountre ſa
volunte ſans
brieſe le Roy
ne ſoit mis a
ſerment ſinon
pour ſealtie,
&c.

Alſo they claim that no Man ought
* *The Words*
* *Auſſi il cleyment que null homme deit* Auſſi il cley-
ment omitted,
to make Oath upon a Book (neither by and the Sen-
ſerment ſur liure ſare, per tence runs
Nepurpoure,
diſtreſſe, nor by the Power of the Lord, &c. as in
diſtreſſs, ne per Poer de Seigneur, Tottel's Edi-
tion.
nor of his Bailife againſt his Will, with-
ne de Bailiff encountre ſa volunte,
out the Writ of the King (unleſs it be
ſaunz bref le Roy (ſinon per
for fealty to be done to his Lord)
Feaute fere a ſon Seigneur)

but

* i. e. Hath he not ſince any thing giuen,
and hath he not ſince any thing paid? then
let him pay ſixe Pounds for his Were, oꝝ
Wmercement, befoze he become Tenant oꝝ
Holder again.

But ſome Copies have the firſt Verſe thus
Nigon ſitbe ſeld, and Nigon ſitbe gelde, i. e.
Let him nine Times pay, and nine Times
repay. Lamb. Peramb. 553. And as to this,
vide ante pag. 249. Itin. Canc. 21 Ed. 1. rot. 23.

Tottel's Edition reads theſe Verſes,
Neigbe ſitbe yeld, Neigbe ſitbe gelt,
And yeſ [i. e. give] you for the were, then is he
holder.

And the M.S. of Lincoln's Inn ſtill differently,
Nengbe ſyche zelde, venge ſite geld,
And xis Pund for the Were, ſen is he baldere.

Various
Readings in
Tottel's Edit.

The Words
between the
Stars omit-
ted.

but only before the Coroner or other
meske per devaunt Coronner, ou autre

Minister of the King, as hath Royal Dow-

*Minister le Roy, * que Real poer eyont*

er to enquire of Trespas committed a-

de Enquiere de trespas fet encountre le

gainst the Crown of our Lord the King.

*Coronne nostre Seigneur le Roy *.*

And they claime also that every Kentish

E cleymet auxi que checun Kentey

Man may eschoie another either in the King's

* A Seignour put autre assonier ^a * en la Court le Roy, * A Seignour, added.

Court, or in the County or in the Hundreth,

en Counte, en Hundreth,

or in the Court of his Lord, where es-

e en la Court son Seigneur, la ou as-

soine lieth, and that as well in the Case

soigne gist, aussi bien de commune

of commune lute as of Plea. Moreover

^b De common fute come ^b [†] de play. *Estre* [†] De com-

Plec.

they claim by an especial Deed of King

ceo il cleymet per especial Fet le Roy

Henrie the Third, father of King Edward,

*Henrie pere le Roy Edward, **

The Words
between the
Stars omit-
ted.

which now is (whom God save) that of the

*que ore est, que Dieu garde, * que de*

tenements which are holden in Gavelkinde

tenementz que sont tenus in Gavylekende

there shall no Battail be joined, nor grand

^c The Words *ne seit prise* ^c § Battaille, ne graunde

Battaille ne
omitted.

Assise taken by xii Knights, as it is used

Assise per xii. Chivallers, sicome aillours

in

Various
Readings in
M.S. Linc.
Inn.

The Words
between the
Stars omit-
ted.

[†] De com-
mune Plec.

The Words
between the
Stars omit-
ted.

§ The Words
Battaille ne
omitted.

Various
Readings in
Tottel's Edit.

in other Places of the Realme: that is to
est prise en le Reaume: ceo est a Various
Readings in
M.S. Linc.

meet, where the Tenant and Demandant
savoir, la ou Tenant e Demaundant Inn.

hold by Gabelkinde: But in the Place of
tenent per Gavylekende: Mes en lu de

these graund Wises let Juries be taken
ces graund Assises soient prises Jurees

by xii. Men being tenants in Gabelkinde:
per xii. homes tenantz en Gavilekend:

so that four tenants of Gabelkinde choose
** Issi que quatre tenantz de Gavilekend*

xii. tenants of Gabelkinde to be Juroys,
eli sent xii. tenantz de Gavylekende Juroys.

The Words
between the
Stars omit-
ted.

And the Charter of the King of this espe-
E la Chartre le Roy de ceste espe-

cialtie is in the custody of Sir John of
ciaute est en la garde Sire Joban de

Boxwood, the Day of St. Alphey in
*a Norwode le Jour de S. ^b * Elpbege en*

^a Norward.
^b Elphe.

• Elphe.

Canterburie the yeare of King Edward,
Canterbyre, c† le an le Roy Edward, ‡

^c Lan du
reigne le Roy
Edward xxi.

the Donne of King Henrie the
le Fiz le Roy Henrie xxi.

† Lan le
reigne le Roy
Edward xxi.

‡ These be the Usages of Gabelkind.
Ces sont les Usages de Gavylekend,

‡ N. B. Neither the M.S. of Lincoln's Inn,
nor Tottel's Edition have this Conclusion, and
it is repugnant to the last Privilege, which is
claimed under the Charter of King Hen. 3.

Various and of Gabelkinde Men in Kent, which Various
 Readings in e de Gavylekendeys en Kent, que Reading
 Tottel's Edit. M.S. Line.

were before the Conquest, and at the Inn.
furent devant le Conquest, e en le

Conquest, and ever since till now
Conquest e toles boures jefkes en ca.

The Names of those Persons whose
Lands in *Kent* are disgavelled by
Acts of Parliament.

11 *H.* 7.
Sir Rich. Guldeford.

15 *H.* 8.
Sir Henry Wiat.

31 *H.* 8. *c.* 3.
Tho. *Lord* Cromwell,
Tho. *Lord* Burghe,
Geo. *Lord* Cobham,
Andrew *Lord* Wind-
fore,
* *Sir* Tho. Cheyne,
Sir Christ. Hales,
Sir Tho. Willoughby,
* *Sir* Ant. Seintleger,
* *Sir* Edw. Wootton,
Sir Edw. Bowton,
* *Sir* Roger Cholm-
ley,
Sir John Champneys,
* John Baker, *Esq*;
Reignold Scot,
* John Guldeford,
* Tho. Kemp,
Edw. Thwaites,
* William Roper,
Ant. Sandes,

Edw. Isaac,
Percival Harte,
Edw. Monyns,
Will. Whetnall,
John Fogg,
Edm. Fetiplace,
Tho. Hardres,
Will. Waller,
* Tho. Wilford,
* Tho. Moyle,
* Tho. Harlakenden,
Godfrey Lee,
* James Hales,
Henry Hufsey,
Tho. Roydon.

2 & 3 *Ed.* 6.
* *Sir* Tho. Cheyney,
* *Sir* Ant. Seintleger,
Sir Robt. Southwell,
* *Sir* John Baker,
* *Sir* Edw. Wootton,
* *Sir* Roger Cholm-
ley,
* *Sir* Tho. Moyle,
Sir John Gate,
Sir Edm. Walsing-
ham,

Persons whose Lands disgabelled.

* <i>Sir</i> John Guldeford,	Tho. Harman,
<i>Sir</i> Humf. Style,	Tho. Lovelace,
* <i>Sir</i> Tho. Kempe,	Reignald Peckham,
<i>Sir</i> Martyn Bowes,	Herbert Fynche,
* <i>Sir</i> James Hales,	William Colepepper,
<i>Sir</i> Walter Hendley,	John Mayne,
<i>Sir</i> Geo. Harper,	Walter Mayne,
<i>Sir</i> Hen. Istey,	Tho. Watton,
<i>Sir</i> Geo. Blage,	John Tufton,
* William Koper,	Tho. White,
* Tho. Wylforde,	Peter Hayman,
* Tho. Harlakenden,	Tho. Argal.
Tho. Colepepper of Bedgebury,	1 <i>Eliz.</i>
John Colepepper of Ailesforde,	Thomas Browne, of Westbecheworth in Surrey,
Tho. Colepepper, Son of the said John,	Geo. Browne.
Will. Twisenden,	8 <i>Eliz.</i>
Tho. Darrel of Scot- ney,	Tho. Browne <i>Esq;</i>
Robert Rudstone,	21 <i>Jac. 1.</i>
Tho. Robertes,	Tho. Potter <i>Esq;</i>
Stephen Darrell,	<i>Sir</i> Geo. Rivers <i>Knt.</i>
Rich. Covarte,	<i>Sir</i> John Rivers <i>Bart.</i>
Christ. Blower,	
Tho. Hendley,	

N. B. Twelve of the Names in 2 & 3 *Ed.*
6. are the same as in 31 *H. 8. c. 3.*

APPENDIX.

Of the Custom of Borough-English.

THERE being so strict an Analogy between the Customs of Gavelkind and Borough English, that according to the Opinion of Lord *Holt*, they differ but in Respect of the *Quantity* of the Land, that the Heir takes, and not in Constrution; I found it necessary in the Course of the foregoing Treatise to take Notice of several Cases concerning Borough English, the Reason of them serving for the Determination of some Points of the other Custom. And it may possibly render the Book more useful and compleat, if I here refer to those Cases, and insert what others are to be found in the Books relating to the same Custom.

But I shall first say something concerning the Name, Antiquity, and Reason of this Custom.

The Name itself guides us to judge of the Antiquity, and teaches us that this Custom had its Rise among the *Anglo-Saxons*: Indeed it is probable that it was not known by this Title, until the *Normans*, who were

Of the Name and Antiquity of Borough English. Bacon of Govern. 66. Co. Litt. 110. b.

Of Borough-Englsh.

Strangers to any such Kind of Descent in their own Country, on their Settlement in this Kingdom gave it the Name of *the Custom of the Saxon Towns*, to distinguish it from their own Law; and this may be collected, from 1 Ed. 3. 12. a. Where it is said, that in *Nottingham* there are two Tenures, *Burgh Engloyes* and *Burgh Frauncoyes*, the Usages of which Tenures are such, that all the Tenements, whereof the Ancestor dies seised in *Burgh Engloyes*, ought to descend to the youngest Son; and all the Tenements in *Burgh Frauncoyes* to the eldest Son, as at Common Law.

The Reason of
this Custom.
Preface to
3 Mod. Rep.

Concerning the Cause and Original of this Custom there are two several Conjectures.

First, Some have imagined that it had its Rise in those Places, where formerly by the Custom of the Manor, the Lord was entitled to the first Night of the Bride of his Tenant, who held in Villenage: Which Right is now commuted for a fine paid in many Manors on the Marriage of the Tenant; and particularly in the *Northern* Counties, who, it seems, drew this barbarous Usage from their Neighbours the *Scots*, among whom, by a Law of their King *Evenus* the Third, *Rex, ante nuptias, sponsarum nobilium, nobiles plebeiarum prælibabant pudicitiam*. Buchan. *Hist. Scot. Lib. 4.* Which continued to be the Practice till *Malcolm* the Third, *Uxoris precibus dedisse fertur, ut primam novæ nuptæ noctem, quæ proceribus per gradus quosdam lege Eveni debebatur, sponsus dimidiatâ argenti marcâ redimere posset: Quam pensionem adhuc Marchetas mulierum*

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herum vocant. Buchan. *Hist. lib. 7.* A Term as well known to our Law for a Fine due to the Lord on the Marriage of the Son or Daughter of his Villein. *Co. Litt. 117. b. 140. a. Braff. lib. 2. f. 26.* And they suppose this Manner of Descent to have been introduced to prevent the eldest Son, who might be the Lord's, from inheriting the Estate. But, I believe, on Inquiry, it will be found that the Custom of Borough-English does not particularly obtain in those Manors where such Fine is paid: And this Reason, though perhaps sufficient to exclude the Eldest, would only, if taken in its full Force, convey the Inheritance to the second Son, as the next worthy, and not to the Youngest.

But the other Reason carries with it the greater Air of Probability, and is that given by *Littleton*; That the youngest Son, after the Death of his Parents, is least able to help himself, and most likely to be left destitute of any other Support; and therefore the Custom provided for his Maintenance by casting the Inheritance upon him.

Sect. 211. & 8Ed 4. 19. a. Crag. Jus Feud. lib. 1. tit. 11. sect. 10.

And I am persuaded this will appear to be the true Reason, if we consider in what Places this Custom prevails; which are for the most part either antient Boroughs, or Copyhold Manors. In the former was exercised the little Trade that was antiently in the Kingdom, * which was not then in so flourish-

* The State of those Tradesmen was so low, that the Heir of any Tenant in Knight-Service (or Gentleman)

Of Borough-English.

flourishing a Condition, that large Estates could be raised by it; a competent Maintenance, and a convenient Habitation, was all that the Tradesman could expect; as he was not rich himself, he could not bring up his Sons to Idleness; but found it most for his own Ease and their Benefit, as they severally grew up, to send them out into the World advanced with a Portion of his Goods, thereby enabling them to acquire their Living by Arts and Industry. And for this Purpose the old Law was very indulgent to the Son of a Burgess, supposing him to be of Age, *cum denarios discretè siverit numerare, pannos ulnare, & alia negotia similia paterna exercere. Glanv. lib. 7. c. 9. Bract. lib. 2. c. 37. f. 86. b.* But as the youngest Son was last in Turn, he was the Child, if any, left unadvanced at the Death of his Father; and therefore the Custom prudently directed the Discent of the Real Estate (generally little more than the Father's House) where it was most wanted. But because it might happen that the youngest Son was in his Father's Life time placed out in as advantageous a Way, as the rest, to avoid any Inconvenience or Inequality, that might arise from an undue Preference to him, the Custom of most Boroughs gave a Power unknown to the Common Law, of devising the Tenements by Will.

Vide Litt.
sect. 167.

was looked upon to be disparaged, if married to the Daughter of one of them. *De Dominis, qui maritaverint illos, quos habent in Custodiâ, Villanis, vel aliis, sicut Burgensibus, ubi disparagentur. Stat. Mert. c. 6. Cq. Litt. 80. Seld. in Hengham 111.*

Of Borough-English.

2. In Copyhold Manors the Demesnes were generally divided among the Tenants in very small Parcels (as they still remain to this Day) and were holden on arbitrary Fines, large Rents, and hard Services; insomuch that these Estates, at that Time, were little more beneficial than Leases at Rack-Rents: And the Tenants themselves being Men of the meanest Sort and Condition, below the Hopes of breeding their Sons Gentlemen, the elder Part of their Family, at a proper Age, either applied themselves to Husbandry, or in those Manors where all the Demesnes were not already parcell'd out, might obtain Estates on the same hard Terms; and the small Advantage of the Father's Tenement was left to descend to the youngest Son, the only, though a mean Support of his Infancy.

Thus much may suffice concerning the Rise of this Custom.

There is no Difference between the Law concerning Copyholds in Borough-English, and Freeholds in Borough-English, as is agreed *Cro. Car. 411. Reeve and Malster.*

In what Places the Custom of Borough-English may be maintained, *vide ante pag.*

32.

The *general* Custom of Borough-English is, That the youngest Son shall inherit all the Lands and Tenements which his Father had within the Borough, &c. whether in Fee-simple or Fee-tail, *ante* 94. And shall have like Remedies for Lands entailed, as the

Borough-English.
1. General.
Lit. sect. 165.
Co. Litt.
110. b.

Of Borough-Englsh.

the Heir at Common Law, but must count on the Custom, *ante* 106. and shall likewise enjoy all Lands of the same Nature, wherein his Father had but an Estate *pur auter vie* descendible, *ante* 97. But this Custom is strictly confined to the youngest Son, or his lineal Representative (if such Son die in his Father's Life-time) who shall take though the Lands were purchased after the Death of such Son; *ante* 91, 92. but does not extend to the youngest Brother without a special Custom of the Place for that Purpose. *Ante* 93.

Of the Nature of this general Custom the Courts of Law will take Notice without pleading specially. *Ante* 38.

2. Special.

But we read in our Books of other *special* Kinds of Borough-Englsh, of which the Law will take noother Notice than as they are specially pleaded. *Ante* 43.

Some of which restrain, and others extend the general Custom:

Of the first Sort are, 1. The Custom of a Manor in the Dutchy of *Cornwall*, That an Estate in Fee in the Lands shall go to the youngest Son; but if in Tail, the Tenements shall descend to the Heir at Common Law: And this was held a good Custom in the Case of *Chapman and Chapman*, *March* 54.

Co Litt.
140. b.

2. In 32 *Ed.* 3. *Age* 81. it is pleaded, That in the Soke of *B.* if a Man has several Sons by one Wife, the youngest shall inherit after the Death of the Father; but if he has two Sons by different Venters, then the Eldest

Of Borough-English.

deft shall inherit to the Father, and not the Youngest. And this Custom is there allowed good.

Those more extensive than the general Custom, are,

1. That if the Tenant has no Sons, but several Brothers, his youngest Brother shall inherit. *Co. Litt. 110. b.*

2. That the youngest Sister shall inherit. *Co. Litt. 140. b.*

Borough-English cannot begin by the King's Grant at this Day. *Ante 52.*

The Custom is not destroyed by Alteration of the Tenure of the Land. *Ante 65.*

It remains notwithstanding Unity of Possession in the Lord. *Ante 70.*

If Lands in ancient Demesne, descendible to the youngest Son, are rendered Frank-fee; yet the customary Descent remains. *Ante 73.*

Custom of Borough-English in Copyhold Lands remains, notwithstanding the Copyhold be severed from the Manor. *Ante 74.*

If a Person dies seised of a Remainder of Borough-English Lands, it shall descend as the Land in Possession. *Ante 78.*

The Use shall follow the Nature of the Land. *Ante 78.*

What Profits of a Fair or Market holden on Borough-English Lands shall follow the Nature of the Lands. *Vid. ante 79.*

What Rents or Common, out of Lands in Borough-English, shall follow the Nature of the Lands. *Vid. ante 79, 80, 81, 82, 83.*

Tithes

Of Borough-English.

Tithes impropriate, issuing out of Borough-English Lands, shall go to the eldest Son. *Ante* 86.

The youngest Son shall have an Attaint or Writ of Error to reverse an erroneous Recovery of Borough-English Lands. *Ante* 107.

Cause of Entry by reason of Infancy, is not like to Conditions, Warranties, and Estoppels, which ever descend to the Heir at Common Law; but a special Heir shall take Advantage of the Nonage of the Ancestor; as if Tenant in Tail of an Acre of Borough-English makes a Feoffment in Fee within Age, and dies, the youngest Son shall avoid it; for he is Privy in Blood, and claims by Descent from the Infant. *Co. Litt.* 237. *b.*

If a Man seised of Land of the Nature of Borough-English has Issue two Sons and dies, and the eldest Son, *before any Entry made by the Youngest*, enters into the Land by Abatement, and dies seised, this shall not take away the Entry of the youngest Brother; for the Law intends that the Eldest entered claiming the Land as Heir to his Father, and therefore the youngest Son and his Heirs may enter upon him and his Heirs in Respect of the Privy of Blood, and the same Claim by one Title. *Co. Litt.* 243. *a.*

The youngest Son being sued or suing during his Infancy for Borough-English Lands descended to him, shall have his Age, or the Parol shall demur, as in the Case of an Infant Heir at Common Law. *Ante* 108.

If

Of Borough-English.

If a Man binds himself and his Heirs in an Obligation, and dies seised of Borough-English Lands, and Lands at Common Law, leaving two Sons, it seems they shall be sued in the same Manner, as if a Man has Lands by Descent on the Part of his Father, and others on the Part of his Mother, and dies without Issue of his Body; in which Case it is said, that the Obligee shall have *several* Actions against the Heirs, and not joint; and if one comes and shews the special Matter, yet Judgment shall be given against him, but the Execution against him shall cease, till the Obligee has recovered against the other, for that each having Lands by Descent, one shall not be charged with the Whole. 11 H. 7.

12. b. But this is only an *obiter* Opinion, and tho' it is certain that one Heir cannot be charged alone, yet if they are severally sued, it is difficult to conceive how one joint Writ of Execution can Issue out of both Records. On the other Hand there will be no Inconsistency, if a joint Action be brought against both Heirs charging, in the same Count, one as Heir at the Common Law, and the other as Heir in Borough-English; a Precedent of which is in *Brownl. Ent.* 180.

If a Man is seised of two Acres, one of the Nature of Borough-English; and binds himself in a Statute of Recognizance, or Judgment is given against him in Debt, and he dies leaving two Sons, the Land of one alone shall not be extended. *Ante* 117. And as the same *Scire facias* shall charge both Heirs in their several Rights with equal

2 Rep. 25. b.

3 Rep. 14. a.

Hob. 25.

Of Borough-English.

equal Reason may the same Declaration in the Case above.

The youngest Son is not Heir to take by Purchase an Estate of Borough-English Lands limited to the *Heirs* of his Father. *Ante* 118. Otherwise if the Devise be to the Heir in Borough-English. *Ibid.*

The youngest Son is not Heir to take Advantage of a Condition annexed to Borough-English Lands. *Ante* 119. Except it be a Condition incident to a Reversion. *Ante* 120.

Where Words of Condition shall be construed a Limitation, in a Will of Borough-English Lands, and where not, *vide ante* 122, 123.

The youngest Son is not Heir to take Advantage of a Warranty annexed to Borough-English Lands. *Ante* 123. Nor shall he be barred by such Warranty. *Ante* 124.

But he may be vouch'd, and in what Manner, *vide ante* 127. And in such Case may deraign the Warranty paramount. — *Ante* 129.

The youngest Son and Heir apparent could not endow his Wife *ex assensu Patris* of Borough English Lands. *Ante* 184.

It is said, that if a Man has Lands in Borough English, and several Sons, he shall not therefore have the Wardship of his youngest Son, because by Possibility he may not continue Heir; as another Son may be born. 3 *Rep.* 38. *a.* 6 *Rep.* 22. *a.*

If

Of Borough-English.

If Copyhold Land of the Custom of Borough English be surrendered to the Use of a Man and his Heirs, who dies before Admittance, the Right shall descend to the youngest Son. *Ante* 98. But if the Custom be only, that the Land of every Tenant *dying seised* shall descend to the Youngest, then the Eldest shall be admitted, in Case the Surrenderee dies before Admittance. *Ante* 98.

Where, Copyhold Lands of the Nature of Borough English being devised to the eldest Son, Equity will supply the Defect of a Surrender to the Use of such Will, and where not. *Ante* 99.

Geo. Reeve, having Issue three Sons, *William*, *George*, and *Charles*, and being seised in Fee of a Copyhold within the Manor of *Hoe* in *Suffolk*, which by the Custom of the Manor was descendible to the youngest Son of the Tenant dying seised, according to the Nature of Borough English, surrendered this Copyhold to the Use of himself and *Anne* his Wife, and of his own Heirs, and he and his Wife were admitted accordingly. Afterwards 2 *Jac.* *George* the Father died seised, the Reversion descended to *Charles* his youngest Son: *Anne* entered and enjoyed the Land for her Life, and afterwards 12 *Jac.* *Charles* died without Issue; and in 6 *Car.* *Anne* died. The Sole Question was, whether *William Reeve*, eldest Son and Heir at Law of *George* the Father, and Brother and Heir to *Charles*, who had this Reversion as youngest Son and Heir in Borough English, or *George* the
the

Of Borough-English.

the middle Son should have the Land. It was agreed, that if the Mother had died before *Charles*, and *Charles* surviving had entered and died without Issue, then *William* should have had the Land as Heir to *Charles*; because the Custom of Borough-English extends not to Brothers, unless there be a special Custom found. But this being a Reversion expectant on an Estate for Life, and *Charles* never being seised of the Land in Possession, but dying without Issue in the Life of the Tenant for Life, *Brampston Ch. Just.* and *Berkeley Just.* argued strongly, that *George* the middle Son should have it, as if *Charles* had never been; for he shall make Title from his Father, and take by Descent from him who had the Seisin of the Freehold, and not make any Mention of him who had but the Reversion expectant on an Estate for Life; for the Custom shall be guided by the Rule of the Common Law, and here was no *Possessio fratris*; and compared it to the Case of Brothers of the half Blood. But *Jones* and *Croke Justices* held, that *William* the Eldest had the better Title; for in this Case, *Charles* the youngest Son, being the Heir in whom it vested by the Custom at the Death of his Father, it is an Inheritance fixed in him, and the Custom has its Operation and is satisfied in him, and there is an End of the Custom, and none shall claim after but he that is Heir to him; and the youngest Son only, who is *in Esse* at the Death of his Father, shall have it by the Custom, and not any other, who shall
come

Of Borough-Englith.

come to be youngest afterwards. *Reeve* and *Malster*, *Cro. Car.* 410. *W. Jones* 361. abridged in 1 *Roll. Abr.* 624. Where *Rolls* seems plainly to incline to the latter Opinion. But *Holt* Ch. Just. says, 1 *Show*, 249. that the middle Son, in this Case, might intitle himself as Heir to his Father. And so the same Judge 6 *Mod.* 122. *Salk.* 244. in the Case of *Clement* and *Scudamore* approves of the Opinion of *Brampston* and *Berkeley*, for that if the Opinion of *Croke* should prevail, it would beget Abundance of Confusion, but the other would settle Things on a sure and lasting Foundation. And the Determination in the Case of *Newton* and *Sbafto*, 1 *Lev.* 172. 1 *Sid.* 267. bears some Resemblance to the Case above. Custom of the Manor of *Tinmouth*, that if a Copyholder dies leaving no Son, but two or more Daughters, the eldest Daughter shall have it only for her Life, and then it shall descend to the next Heir Male, deriving his Title through Males, or if no such, escheat to the Lord; and likewise, that after the Death of the Copyholder, his Wife shall have it for Life. The Wife entered, and the elder Daughter died in the Wife's Life-time, and afterwards the Wife died; and the Court held the Custom good, and that the second Daughter should have the Land for her Life within the Custom, for though she was not eldest Daughter at the Death of her Father, yet she was at her Mother's Death, whose Estate was a Continuance of the Husband's

Y

Estate

Of Borough-English.

Estate till her Death, as in the Case of Free-Bench.

Per *Croke* and *Jones* Justices in the Case above of *Reeve* and *Malster*, if a Man has Issue a Son, and dies seised in Fee of Land in Borough English, his Wife enseint of another Son, the Son *in Esse* shall have it by the Custom, and the Son born afterwards shall not divest him, because he was youngest at the Death of his Father. But *Brampston* and *Berkeley* held the contrary: And, as it seems, with good Reason; for even customary Descents, in their Incidents and Consequences, shall be governed by the Principles of the Common Law; the Rule of which is, that an Estate vesting by Descent may be divested again on the Birth of a Person having a nearer Title.

Cases in E- *Lutwyche* and *Lutwyche*, *Canc. Hill.*
quity in Time 8 *Geo.* 2. 1734. A Cause by Consent for
of Lord Chan- the Opinion of the Court; wherein *Talbot*,
cellor *Talbot*, Lord Chancellor decreed, that the late Mr.
(commonly *Lutwyche*'s younger Son should have his
called *For-* whole distributive Share of his Father's per-
rester's Rep.) sonal Estate, who died Intestate, without
276. bringing into Hotchpot a Copyhold at *Turn-*
ham-Green, which being of the Nature of

Borough English descended to him from
his Father; for that such Estate *descended*
is not within the Statute of Distributions:
22 & 23 *Car.* 5. Though *Jekyll*, Master of the Rolls, had de-
2. 10. sect. 5. creed the contrary in the Case of *Pratt* and
Pratt: Which was thus. The late Chief
Justice *Pratt* purchased a Copyhold in Bo-
rough-English, which was surrendered to
the

See *Fitzgib-*
bons, 284.

Of Borough-English.

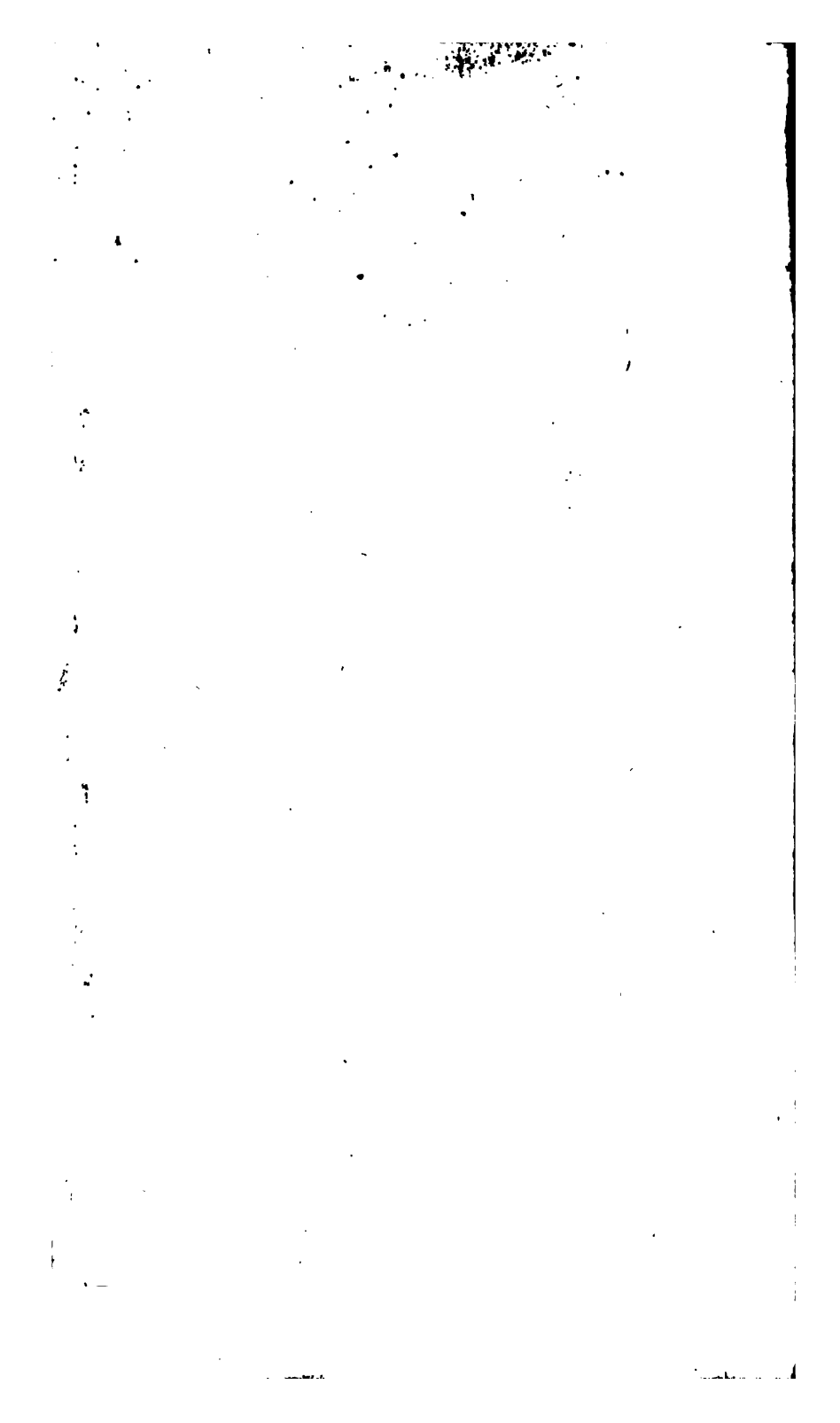
the Use of himself for Life, Remainder to the Use of his Wife for Life, Remainder to the Use of his own right Heirs; and was admitted accordingly, and died Intestate, leaving several Children; the Master of the Rolls 29 *May* 1731, held, that the youngest Son should not have his distributive Share of the personal Estate of his Father, unless he brought the Borough English into Hotch-pot. But this was afterwards reversed by *Talbot*, Lord Chancellor, who decreed as he had before in the Case of *Lutwyche* and *Lutwyche*.

F I N I S.

E R R A T A.

Page 9. l. 18. for "*the*" read "*this*."—P. 21. l. 6.
 for "*sui*" read "*suo*."—P. 24. l. 14. for "did not
 descend," read "did not *then* descend."—P. 49.
 l. 1. before "terretenants," read "the."—P. 59.
 l. ult. for "569," read "589."—P. 73. l. 7. for
 "ove," read "al."—P. 74. l. 18. for "us" read
 "at."—P. 86. l. 25. dele "in."—P. 115. l. 21.
 E. for "descend" read "come."—P. 143. l. 18. dele
 "inter."—P. 172. l. 24. for "whereof husband,"
 read "whereof *her* husband."—P. 175. l. 22. for
 "it said," read "it is said."—P. 179. at the side,
 L. for "whether by custom a dower," read "whether
 the customary dower."—P. 181. l. 35, for "secun-
 dam," read "secundum."—P. 193. l. 32. for
 "625," read "626."—P. 200. l. 4. for "patriz"
 read "patri".—P. 212. at the side, for "release on
 confirmation" read "release and confirmation."—
 P. 250. l. 1. for "56" read "55."—P. 260. l. 18.
 for "matter," read "manner."—P. 282. at the
 the side, for "on droit" read "son droit."—P. 291.
 l. 28. for "eschete a", read "eschete seit a,"
 —P. 293. l. 19. "for take tenement," read "take
 that tenement."—P. 297. l. 3. for "meet," read
 "weet."







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